REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 169 OF 2019

NCBA BANK PLC.....APPELLANT

VERSUS

CYRUS NDUNG'U NJERI

T/A DIGITAL TOURS AND LOGISTICS.....RESPONDENT

(Being an appeal from the Judgment of the Mavoko Resident Magistrate

Hon. R. W. Gitau delivered in Mavoko CMCC No. 300 of 2019 on 3rd December, 2019)

BETWEEN

CYRUS NDUNG'U NJERI

T/A DIGITAL TOURS AND LOGISTICS.....PLAINTIFF

VERSUS

NCBA BANK PLC.....DEFENDANT

JUDGEMENT

1. The Respondent herein instituted legal proceedings against the Appellant before the Chief Magistrate's Court, Mavoko in Mavoko CMCC No. 300 of 2019 in which he sought for an order of injunction restraining the Appellant from selling or disposing of motor vehicle reg. no. KCP 076N pending the hearing and determination of the suit and an order directing the Appellant to release the said motor vehicle to the Respondent.

2. According to the plaint dated 18th April, 2019, vide a hire purchase agreement entered into between the Appellant and the Respondent in September, 2018, the Appellant partly financed the purchase of the said vehicle and the same was registered in the joint names of the parties to the said agreement. Under the terms of the said agreement, it was pleaded, the Respondent was, inter alia, required to be paying the Appellant the sum of Kshs 139,882/- until payment in full.

3. In or about January, 2019, owing to circumstances beyond the Respondent's control, he fell into arrears in the repayment and the Appellant repossessed the said vehicle. The said repossession, it was pleaded, was done without prior proclamation. Subsequently, it was averred, the Respondent cleared the outstanding loan arrears and upon requesting the Appellant to release the same, he was informed that the vehicle had been sold but without being furnished with any supporting evidence.

4. According to the Respondent, he conducted a search of the said vehicle and confirmed that the same had not been transferred to a third party and was apprehensive that the Appellant was intent on disposing the same fraudulently.

5. It was based on the foregoing that the suit was instituted.

6. Together with the plaint, the Respondent filed an application vide Chamber Summons dated 18th April, 2019 seeking, inter alia, orders in the nature of prayer 1 in the plaint as well as for release of the subject vehicle pending the hearing and determination of the suit.

7. In its defence, the Appellant admitted that it financed the said vehicle after the Respondent applied for a credit facility from the Appellant on hire purchase terms and that the total sum payable under the facility as from its commencement was a consolidated sum of Kshs 6,141,852/-. It was averred that as the Respondent did not clear the sums due under the agreement, the Appellant was justified in disposing of the suit vehicle by way of sale. It was pleaded that the Respondent was well aware of and was notified of the intended sale and that the same was advertised in the media.

8. According to the Appellant, at the time the vehicle was repossessed and all through leading to the sale, the Respondent's account was in arrears.

9. In his evidence, PW1, **Cyrus Ndungu Njeri**, the Respondent, testified that on recommendation of TNL Transport & Lifting Services, a dealer, he approached the Appellant to finance a portion of the purchase of the trailer Reg. No. KCP 076N, Trailer Horse whose value of Kshs 7.3 million. The sum to be advanced, it was averred was Kshs 4.5 million which was 70% while the Respondent was to contribute 30% thereof amounting to Kshs 3,000,000/-, which was indicated as down payment. According to him, the monthly repayment was Kshs 127,970/-. According to the Respondent, the motor vehicle was insured for 1 year which was factored in the financing agreement with the Appellant.

10. The said trailer was supposed to be used in transport business of wine, in which he had a contract with **Lucy Wanjiru Kimani** of Lawkim Enterprises, for a period of 1 year from 10th October, 2018. According to the Respondent, he was to charge Kshs 1,250,000/- per trip for the said business and he anticipated that he would make 7 trips each trip taking 45-45 days to and fro. He also anticipated other contracts on return trip to South Africa and had a contract with **Peter Waititu Gachiri** to transport furniture to Zimbabwe for which he charged Kshs 500,000/-. He however, only made one trip.

11. However, the Respondent fell in arrears in the loan repayment arising from the challenges he got when he made his first trip on 13th December, 2018 in Harare. He duly informed the Appellant of the said challenges and promised to make good the default upon his return. However, in early March, the vehicle was repossessed along Mombasa-Mlolongo area by the auctioneers. Upon rushing to the scene, he was not furnished with any proclamation by the people who introduced themselves as auctioneers but they requested him to accompany them to the yard.

12. According to the Respondent, the arrears were then for the months of December, 2018, January and February, 2019 as those of March, 2019 were not yet due. According to him, by email dated 5th March, 2019, the Appellant demanded Kshs 521,556/- while on 23rd March, 2019, they demanded Kshs 537,754/-. The said demand did not say anything about the insurance. Upon approaching the Appellant's staff, he was told to pay the sum of Kshs 527,000/- in order to get back his truck. He stated that by 26th March, 2019, he had paid a total sum of Kshs 500,000/- by instalments. However, on that day when he met the Appellant's manager in charge of remedial, he was informed that the amount he was paying was going towards insurance thus he still owed Kshs 527,000/- and was advised to organise a payment of at least Kshs 260,000/- for the release of the truck. According to him, as at 12th April, 2019 there were no outstanding arrears. After depositing a further Kshs 250,000/- he went to the head office to secure the release of the truck but was informed that the truck had been sold for Kshs 4,021,000/- to TNL Transport & Lifting Services, the very company that sold to him the truck and which had advised him to seek financing from the Appellant.

13. PW1 testified that he was unable to perform his contract with Lawkwim Enterprise and as a result received demand letter dated 14th June, 2019 for Kshs 2,000,000/- from their lawyers for breach of contract. It was his evidence that from the said contract, he anticipated to generate revenue in the sum of Kshs 7.5 million and sought for loss of the business and the truck.

14. In cross-examination, PW1 admitted that he was familiar with the hire purchase agreement which he voluntarily signed. Though he did not obtain legal advice before doing so, he read it and was okay with it and agreed to be bound by it. He also admitted that at the time of repossession he was in arrears of about Kshs 527,000/- and that he had not paid for 3 months. Referred to the agreement he agreed that he was deemed to have repudiated the agreement if he was in default for 14 days upon the payment falling due, in which event the Appellant had the right to commence repossession process. He also confirmed that the amount payable towards insurance as per the Insurance Premium Financing Agreement was Kshs 483,407/- but he was unaware if the Appellant had the right to call in the entire insurance premium at any time. He reiterated that he was informed that the amount he had paid had gone towards insurance and that the amount of Kshs 527,000/- was still due.

15. It was his evidence that he only saw repossession and storage charges in the statement and was unaware that he was supposed to pay the same. He admitted that the Appellant wrote to him on 3rd March, 2019 informing him that they were intending to repossess the vehicle but he could not recall the exact date of repossession though it was in early March. He could not therefore state with certainty if it was 22nd March, 2019. Referred to the letter dated 23rd March, 2019 which demanded payment of Kshs 537,754.48, he admitted that he was aware of the same. According to him he paid Kshs 260,000/- upon being advised to do so by Appellant's staff in charge of repossession whose name he could not recall. Since the demand of 23rd March, 2019, he paid the sum of Kshs 366,000/-. According to him, the letter dated 23rd March, 2019 was authored by **Joseph Wachira**, the appellant's manager, Business Remedial Support, whom he admitted he never talked to.

16. In answer to the loss of business, he stated that the summary was drafted by him and though he had been in business for 14years, he did not have statement of accounts for the business and had no proof of payment of taxes. He reiterated that he did one trip for Lawkim Enterprises at 1.25 million though the particulars of the permit holder did not disclose Lawkim and only had the trailer registration. He admitted that a look at the documents would not show any nexus with Lawkim.

17. In re-examination, he maintained that the Appellant did not at any given time demand for insurance premium repayment. He confirmed that the loan repayment statement issued by the Appellant was a true reflection of his affairs with the Appellant. According to him, the

documents contained in the loss of business revealed the connection with Lawkim and that the proof of whose goods were being transported was in the invoice but there were no official documents.

18. On its part, the Appellant called **Joseph Murimi**, its relationship manager as DW1. The witness, whose work entailed acquiring customer and monitoring the relationship with customers and giving reported to the relevant department.

19. According to him the Respondent was the Appellant's customer in respect of a facility which he took. However, the Respondent was not servicing the loan which was in arrears. Accordingly, the Appellant notified the Respondent of the same through a demand letter dated 5th March, 2019 giving the Respondent time to pay Kshs 521,556/- but no payment was made. Later on 23rd March, 2019, the Appellant issued another demand reminding the Respondent that the vehicle was repossessed on 23rd March, 2019 due to his inability to meet the agreed monthly instalments. By that time the Appellant had already repossessed the vehicle and that the letter was intended to inform the Respondent of the fact and give him 7 days to pay Kshs 537,754.48 together with repossession and storage charges failure to do which the vehicle would be sold.

20. DW1 further testified that the sale of the vehicle was advertised in the media on 2nd April, 2019 and the vehicle was eventually sold through bidding and not at a reserved price as indicated in the advert and the Appellant took the highest price it could get under the circumstances. By 15th April, 2019, the Respondent had not paid the amount demanded hence there was breach of the agreement and the efforts to save the situation were not met.

21. In cross-examination, DW1 stated that the vehicle was repossessed on 23rd March, 2019 but he was not privy to the fact of service of the proclamation. In his view the demand letter of 23rd March, 2019 served as the proclamation. By that time no payment had been made. However, referred to the statement, he confirmed that on 21st March, 2019, there was a deposit of Kshs 100,000/-. He however stated that the statement was a current account and not for loan account though the Appellant could retrieve the money from the same towards the payment of the loan. He confirmed that as at 12th April, 2019, there was nil balance on the account meaning that the account had no money. While admitting that the Appellant did not issue a written demand for insurance premium, he asserted that the same was made by email but he had no evidence of the same.

22. Referred to the Appellant's bundle of documents he confirmed that the demand was for Kshs 521,556/- for instalments not paid on the loan and that it was on account of account of failure to pay the same that the vehicle was repossessed. He confirmed that there was no mention of insurance. He admitted that certain payments were made on 21st March, 2019 subsequent to the demand of 5th March, 2019. However, the demand of 23rd March, 2019 did not take cognisance of the payment made on 21st March, 2019 as the same went to other obligations. In his evidence, the payment of insurance premium finance was contained in the Insurance Finance Agreement though he had no evidence of the demand for the same.

23. According to DW1, the vehicle was sold on 15th April, 2019. Though he did not have the exact figures of the arrears, he insisted that it was not correct that nothing was outstanding since what the Respondent deposited between 21st March, 2019 and 15th April, 2019 did not total to Kshs 537,754 after deducting the insurance payment. Referred to the bundle, he stated that the monthly insurance payment was Kshs 51,771/- while the estimated value of the vehicle was Kshs 7.5 million. Since the release of the vehicle to the Respondent, there was no report of an accident. He confirmed that he never saw the vehicle after its repossession and that the Appellant did not value the vehicle after repossession and before the sale. Though a reserve price had been set, he did not know how it was arrived at as it was done by a different department. In his evidence repossession was done approximately 5 months after the vehicle as released to the Respondent and he was not privy to its valuation at the point of purchase.

24. Referred to the valuation report by Regent Auto Mobile Valuers, he stated that the market value was Kshs 7.5 million and the forced sale value was 6.750 million. However, the vehicle was sold at Kshs 4,021,000/-. He admitted that they did not account for the sale to the Respondent. However, after taking into account the amount realised the loan had not been settled though he could not tell the actual outstanding amount as at July, 2019. He insisted that the amount was accruing interest everyday.

25. In re-examination, he stated that if a customer does not pay the insurance, they debit the account to cover both the customer and the bank other than the first insurance instalment. However, since no further payment was made, the insurance could have cancelled the insurance leaving the bank exposed. In his evidence the figures mentioned in the valuation report were as at 3rd October, 2018.

26. In her judgement, the learned trial magistrate found that the legality of the repossession was not in question since it was conceded that the Respondent was in arrears of loan repayment. In her view what was in dispute was the procedure followed by the Appellant in exercising its right. She also found that sections 65-67 of the ***Moveable Properties Securities Act*** (hereinafter referred to as "the Act") provides for enforcement of security rights and that the secure creditor is required by law to issue notice in writing to the grantor notifying him of the default and requiring him to make good the default within a particular period of time and in default may either sue the grantor or take possession of the moveable property amongst other options. The court however found that the Act is silent on how the procedure by which right to take possession is to be exercised hence the decision to instruct the auctioneers to attach and repossess the suit vehicle. The court then referred to section 2(3) of the ***Auctioneers Act*** as well as Rule 12 of the ***Auctioneers Practice Rules*** and found that proclamation notice is required under Rule 12(1)(b) thereof over and above the one issued by the secure creditor under section 67 of the Act since the same is issued after the right to possess has accrued.

27. The learned trial magistrate therefore found that though the attachment of the vehicle as legally justified, the procedure was wanting for failure to issue the proclamation notice and the failure to give the 7 days notice before attachment/possession. Based on the evidence adduced, the court found that there was no rationale for selling the vehicle at Kshs 4,060,00/- as opposed to at least Kshs 4,290,000/- which was indicated in the advert as the reserve price. She however found that though there were irregularities, no fraud was proved. It was however found that as at 12th April, 2019, the arrears had not been cleared and that there still remained a balance of Kshs 6,754.48. It was found that as no demand was made for insurance payment, contrary to the terms of the agreement, it was wrong to apply the payments made

by the Respondent towards insurance premiums.

28. While dismissing the claim for wrongful repossession which in her view ought to have been made against the auctioneer who was however not sued, the court found that the vehicle was sold at an undervalue. She proceeded to award a nominal award of Kshs 269,000/- being the difference between the reserve price set by the Appellant and the actual sale value and entered judgement for the said amount with interest at court rate from the date of judgement.

29. Aggrieved by the said decision, the Appellant appeals to this Court citing the following grounds:

> ***1) THAT the Honourable Learned Magistrate erred in law and fact and exercised her discretion erroneously in awarding damages of Kshs. 269,000/- to the Respondent.***
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> ***2) THAT the Honourable Learned Magistrate erred in law and fact in holding that the Appellant should pay to the Respondent Nominal Damages in the sum of Kshs. 269,000/- which award was contrary to, and was not supported by the evidence tendered in the Lower Court.***
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> ***3) THAT the Honourable Learned Magistrate erred in law and fact in holding that the Appellant was obligated to sell the Vehicle, subject of the proceedings in the Lower Court, at a pre-set reserve price when such a finding was not supported either by the law or the Contract between the Parties.***
>
> ***4) THAT the Honourable Learned Magistrate erred in law and fact in arriving at a decision which decision was contradictory and against the weight of the submissions and points of law tendered particularly on the award of damages of Kshs. 269,000/-.***
>
> ***5) THAT the Honourable Learned Magistrate erred in law and fact in holding that the repossession by the Appellant was wrongfully done despite the fact that the Appellant tendered evidence demonstrating that the repossession was done in full compliance of the applicable law.***
>
> **6)** ***THAT the Honourable Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities tendered at the Lower Court in arriving at her finding.***

30. The Respondent also filed a cross appeal raising the following grounds:

> **1. The honourable trial magistrate erred in fact and in law by failing to appreciate that the Respondent suffered colossal business and or monetary loss owing to the Appellant's unlawful acts and that the award of damages rendered was not commensurate with such loss.**
>
> **2. The honourable trial magistrate erred in law and in fact by failing to consider and appropriately apply the case precedents cited by the Respondent in support of an award for damages.**
>
> **3. The honourable trial magistrate's assessment of the damages awardable is against the weight of the Respondent's evidence in that regard.**

31. The Respondent therefore prayed that;

> **a) The Cross Appeal be allowed.**
>
> **b) The award of damages (by the trial court) be enhanced.**
>
> **c) Costs be awarded to the Respondent.**

32. Before this court the Appellant submitted that the Appellant Bank fully complied with the requirements of the ***Moveable Properties Securities Act, 2017*****.**

33. The said Act, it was submitted, aims at facilitating the use of moveable property as security by both individuals and corporates and to provide for the registration of security rights in moveable property such as the Collateral in this case. The Act further provides for Post Default rights available for exercise by the Secured Creditor after the failure by a Debtor to pay or otherwise perform a secured obligation.

34. It was submitted that the learned Trial Magistrate fell in error in her holding that as requirement for issuance of a Proclamation was not set out specifically in the Act, the fall back was to rely on the provisions of the ***Auctioneers Act*** and specifically Rule 12 of the ***Auctioneers Practice Rules***.

35. It was submitted that the trial court having found that the right to possess having accrued the Appellant was well within its rights to set into motion the process of enforcement of its rights under Part VII of the Act and specifically Sections 65-67 of the Act. According to the Appellant, Part VII of the Act sets out the regulations in respect of enforcement of security rights by a secured creditor upon default by a Grantor. It was submitted that though the Act does not provide for issuance of a Proclamation as a mandatory requirement, the Appellant served upon the Respondent two Notices, with the first dated the 5th March, 2019 prior to Repossession and the second the 23rd March, 2019 prior to Sale. According to the Appellant, the applicable law being the Moveable Property Securities Act requires that the Notice should contain the information set out under Section 67(2) of the Act which includes among others, the nature and extent of default, actual amount

where money is owing and the actions the Creditor wishes to carry out. It was submitted that the two letters of 5th March, 2019 and 23rd March 2019 issued by the Defendant fully complied with that proviso and the Act.

36. The Appellant contended that had the draftsman intended that Proclamation in the form and content of that under the ***Auctioneers Act*** and Rules was required or would be a mandatory requirement this would have been expressly stated in the applicable Statute. This submission was based on the decision of the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425** and submitted that where an Act of Parliament provides for a clear procedure in carrying out a remedy or a right or effecting the obligations under and in Statute the Court should not, as the learned Trial Magistrate did in this case, substitute that statutory procedure with another. According to the Appellant, the Appellant Bank was not required to issue a Proclamation within the meaning of the ***Auctioneers Act*** and Rules and therefore the learned Trial Magistrate fell in error on this issue.

37. It was submitted that since the Defendant placed an advertisement on the Sale of the subject Unit in Two (2) Newspapers of wide circulation, the Respondent had an opportunity before Sale to redeem the subject property as provided under Section 69 of the Act. According to the appellant, the Sale referenced in the applicable Statute is not limited to a Sale by Auction. In this case, the evidence that was adduced before the Trial Court points to the fact that the instant Sale was not by way of Public Auction but by way of a Private Tendering Process where bids were submitted to the Bank as per the advertisements adduced in evidence before the Trial Court and that the involvement of the retained Auctioneer in this case was limited to repossession of the Motor Vehicle and their professional services outside this function were not employed by the Bank. It was therefore submitted that the Trial Court misdirected itself in purporting to impose Auctioneering Rules in a private Sale Agreement.

38. In the Appellant's view, in the event that the secured creditor intends to dispose of the collateral, the secured creditor is required under the Act to send a notice to the Grantor of its intention to dispose of the collateral as required under Section 73(1) of the Act which was done by way of the letter of the 23rd of March, 2019 and further by the newspaper adverts which the Respondent admitted to having notice of.

39. It was therefore submitted that the Learned Trial Magistrate erred in law and in fact in holding that the Appellant had not followed procedure.

40. The Appellant also submitted since the facts of the case clearly demonstrate that the Appellant Bank followed procedure to the letter in this matter and as the Respondent was in default and the Post Default rights open to the Appellant Bank had accrued, the Trial Court fell in error in her ascertainment of the above issues and her consequent finding of damages in favour of the Respondent.

41. In this case it was submitted that the Trial Court was fixated on the assumption (not supported in law) that the Subject Collateral had to be sold at the reserve price of Kshs. 4,290,000/-. According to the Appellant, it is evident from the evidence that the Appellant Bank set a reserve price whose purpose to ensure that serious Bids were tendered by the Parties seeking to purchase the Vehicle. Therefore, the Bank was not restricted to the reserve price but to the duty to ensure that the best obtainable price was obtained for the Motor Vehicle in the interest of both the Respondent and the Appellant Bank, the Vehicle being a fast-depreciating Asset.

42. This, it was submitted, should be contrasted with the statutory requirement in Section 97 of the ***Land Act*** for example that requires a Chargee to sell Land while exercising its statutory right of Sale at a price that is no less than 75% of the Market Price. There is no such requirement in the Principal Act – the Moveable Property Securities Act - that governs such Collaterals as the Motor Vehicle in this case. In this case, the Collateral was sold to the highest bidder as is evidenced in the Documents supplied to Court. In addition, the Bank made all effort to get a price as close as the Reserve Price as possible as is evidenced by their letter of the 15th of April, 2019. It was therefore contended that the finding by the Court that the damages in this case should be the difference between the Sale Price and the Reserve Price is not founded in law. Accordingly, it was submitted that the Trial Magistrate therefore fell in error in holding that the sum of damages should be the difference between the Sale price and the Reserve Price as this finding is not supported in fact and evidence.

43. As regards the cross-appeal it was submitted that the Respondent has not shown a case for the award of Damages in the first place and the enhancement of damages in any event. According to the Appellant no evidence was adduced to support the claim by the Respondent. and this position was based on the decision of the Court of Appeal in **Kenya Tourist Development Corporation vs. Sundowner Lodge Limited [2018] eKLR**.

44. Consequently, it was submitted that the Cross Appeal is not merited and should be dismissed.

45. On the part of the Respondent, reliance was placed on the submissions made before the trial court and, while conceding that Sections 65 and 66 of the ***Movable Properties Securities Act*** are silent on whether a Notice of Proclamation is requisite or not before exercise of a lender's Post Default Rights, the Respondent noted that the trial magistrate correctly observed that the Appellant, by choosing to engage an auctioneer in the repossession process, rendered the said process subject to the provisions and requirements of the ***Auctioneers Act*** and Rules which make it mandatory for the appointed agent (i.e. auctioneer) to issue a proclamation notice prior to repossessing a chattel such as the motor vehicle in question. According to the Respondent it is gainsaid that the purpose or rationale for issuing such a notice is to inform the defaulting party the extent of the default and what is required of him (including the auctioneer's costs) in order to redeem the repossessed chattel.

46. It was therefore submitted that the trial court's finding that the repossession though justifiable (on account of loan default) was wrongfully and irregularly undertaken for want of issuance of a Proclamation Notice cannot and must not be faulted by your Lordship. Hence the trial court properly made a determination on the issue of liability herein.

47. As regards the quantum of damages, it was submitted that in his pleadings (including various Affidavits), oral testimony, documentary evidence and written submissions, the Respondent went to great lengths to demonstrate the vast efforts he made towards redeeming the repossessed motor vehicle and the shadowy circumstances under which the same was sold which according to him amounted to fraud. It was therefore submitted that the trial magistrate erred in fact and in law by failing to find that the subject motor vehicle was fraudulently sold

hence her award of nominal damages was misguided. Had the said magistrate properly determined the issue of the alleged fraud which, according to the Respondent was adequately backed with facts and evidence, she would have decreed an adequate award of Exemplary as opposed to Nominal damages.

48. This Court was therefore urged to review the evidence tendered in the lower court (and surmised in the Respondent's written submissions filed therein) and award damages in the sum of at least Kenya Shillings Ten Million (Kshs. 10,000,000/=) as earlier prayed.

Determination

49. I have considered the material placed on record before me in this appeal.

50. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

51. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

52. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

53. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

54. In this appeal, though the Appellant has delved into the finding by the learned trial magistrate that the procedure that was resorted to in disposing off the vehicle was irregular, that was not the ground upon which the Appellant was found liable. According to the learned trial magistrate the Appellant was found liable because of selling the vehicle as a price that was below the reserved price.

55. It is not in doubt that the vehicle was not sold at the reserved price which according to the advertisement was Kshs 4,290,000/-. However, the vehicle was sold at Kshs 4,021,000/-. In the Appellant's view, the reserve price was only placed to ensure that serious Bids were tendered by the Parties seeking to purchase the Vehicle and that the Bank was not restricted to the reserve price but to the duty to ensure that the best possible price was obtained for the Motor Vehicle in the interest of both the Respondent and the Appellant Bank.

56. With due respect to the Appellant, it cannot be that the reserve price as advertised losses meaning once the bids are made however low.

Article 46 of the Constitution provides that:

> ***46. (1) Consumers have the right—***
>
> ***(a) to goods and services of reasonable quality;***
>
> ***(b) to the information necessary for them to gain full benefit from goods and services;***
>
> ***(c) to the protection of their health, safety, and economic interests; and***
>
> ***(d) to compensation for loss or injury arising from defects in goods or services.***
>
> ***(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.***
>
> ***(3) This Article applies to goods and services offered by public entities or private persons.***

57. It is therefore clear that consumers of service including banking services are entitled to the protection of their economic interests. Those rights, in my view includes the right to the best possible market price when the secured creditor resorts to selling the security to recover its loan. Therefore, where the value of the security being sold can be ascertained, it is the duty of the secured creditor to ascertain the said value as much as possible dispose the property at a price as near as possible to the value of the property in question. Reserve price is not, as the Appellant contends, for the benefit or information to the bidders only but is also meant to protect and safeguard the interests of the customer.

58. Long before the advent of the current Constitution, it was held by the Court of Appeal in **Mbuthia vs Jimba Credit Finance Corporation & Another, Civil Appeal No. 111 of 1986 -** as hereunder:

> **"What is meant by having "regard to the interest of the mortgagor?" there is similar legislations in England (see section 101 of the Law of Property Act (1925))…In *Halsbury's Laws of England*, 4th ed. Vol. 32 para. 276 it is stated:**
>
> ***If the mortgager seeks relief promptly a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud.***
>
> **…So far as mortgagees are concerned the law is set out in *Cuckmere Brick Co. Ltd vs Mutual Finance Ltd (1972) 2 ALL E.R. 633, (1971) Ch.939*. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible… There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care."**

59. The learned trial magistrate found that the Appellant had not explained why it decided to ignore its own reserve price and to sell the property at a lower price. In light of the material placed before me, there is no warrant for me to interfere with the findings of the learned trial magistrate.

60. As regards the Respondent's case, it was admitted by him in cross-examination that the summary of the loss of business relied upon by him was crafted by himself and though he had been in business for 14 years, he did not have statement of accounts for the business and had no proof of payment of taxes. He admitted that a look at the documents would not show any nexus with Lawkim. In those circumstances, it cannot be said that the loss claimed was proved to the required standards.

61. As regards the failure to award the Respondent exemplary damages, it is important to interrogate the circumstances under which exemplary damages are awardable. In **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001,** the Court of Appeal citing **Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91** and **Rookes vs. Banard & Others [1964] AC 1129** held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. In this case there is no evidence that the action by the Appellant was oppressive or arbitrary. It is conceded that the Respondent was in default and that the Appellant was entitled to exercise its statutory rights. It is the manner in which the said rights were exercised that was objectionable. Similarly, and on the same basis, there is also no evidence that by conducting itself in the manner it did, the Appellant set out to procure some benefit at the expense of the Respondent.

62. In the premises both the appeal and cross-appeal fail and are dismissed.

63. Consequently, each party will bear own costs of this appeal.

64. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS 28TH JUNE, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Kibor for Mr Onuonga for the Appellant

Miss Bunei for Mr Mugo for the Respondent

CA Geoffrey