



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 98 OF 2019**

**BETWEEN**

**JAMII BORA BANK LIMITED.....1<sup>ST</sup> APPELLANT**

**KIM AUCTIONEERS.....2<sup>ND</sup> APPELLANT**

**AND**

**JAMES OWEK OCHIENG.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 278 of 2018 by Hon. R. Ondieki(SPM) on 15<sup>th</sup> July, 2019)**

**JUDGMENT**

1. The Respondent's case at the lower court was that by a letter dated

28.12.16 at his request, the 1<sup>st</sup> Appellant advanced him a loan of Kshs. 600,000/- which was secured by a Chattels Mortgage against Motor Vehicle KBP 278X Wish (*motor vehicle*). It was his case that inspite of faithfully liquidating the loan in terms of the Letter of Offer (*Letter of Offer*) dated 28.12.16 and the Chattels Mortgage (*Chattels Mortgage*) dated 28.12.16, the 1<sup>st</sup> Appellant on 09.06.18 instructed the 2<sup>nd</sup> Appellant to repossess the said *motor vehicle*. As a result, thereof, the Respondent sued the Appellants seeking orders **THAT:**

**1) A declaration that the repossession of Motor Vehicle KBP 278X Wish was premature, irregular and unlawful**

**2) An order of permanent injunction restraining the defendants of themselves, agents, servants and or such other person from repossessing Motor Vehicle KBP 278X Wish or in any other way interfering with the plaintiff's quiet and lawful use and possession of Motor Vehicle KBP 278X Wish**

**3) Loss of user**

**4) Costs of the suit**

2. The Appellants' denied the Respondent's claim and stated that their action was justified in view of the fact that Respondent had by making irregular payments breached the terms and conditions contained in the *Letter of Offer* and the *Chattels Mortgage*.

3. The trial court heard both parties and in a judgment dated 15. 07.19 made the following orders:

**1) A declaration that the repossession of Motor Vehicle KBP 278X Wish was premature, irregular and unlawful and should be released immediately**

**2) An order of permanent injunction restraining the defendants of themselves, agents, servants and or such other person from repossessing Motor Vehicle KBP 278X Wish or in any other way interfering with the plaintiff's quiet and lawful use and possession of Motor Vehicle KBP 278X Wish**

**3) The Plaintiff to continue to pay and meet his monthly obligations and all arrears due to the Defendant and in the event of default, the Defendants will be at liberty to issue appropriate notices under the security documents to the Plaintiff for**

delivery up of the assets constituting the security

4) The 1<sup>st</sup> Defendant to immediately and in any such event not later than 14 days from the date of service of this order supply the Plaintiff with a detailed account showing interest charged on the credit facility since 17.01.17

5) Liberty to apply by either party

6) Costs to the Plaintiff

7) Loss of user

8) Costs of the suit The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal in which they fault the trial court for the following:

1) Holding that the Appellants failed to issue the Respondent with proper statutory notices

2) Implying that the Appellants ought to have issued the Respondent with a Proclamation Notice when in fact no law provides for the issuance of a proclamation notice where a registered chattels mortgage exists

3) Issuing a permanent injunction when the validity of the registered chattels mortgage is not disputed

4) By failing to consider that the Respondent had admitted securing the loan facility of Kshs. 600,000/- using Motor Vehicle KBP 278X Wish

#### Analysis and Determination

5. Resolution of this contention is a factual and legal issue and as I noted earlier, the trial magistrate resolved the matter in favour of the Respondent. This court though, as the first appellate 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 & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123).

6. I have carefully considered the evidence that was tendered before the trial court and submissions on behalf of both parties and deduced the following issues for determination:

i. Whether the Respondent had defaulted as at the time of repossession

ii. Whether the repossession was lawful

iii. Whether the Respondent had met the threshold for the grant of a permanent injunction

#### Had the Respondent defaulted as at the time of repossession

7. The statement of account tendered in evidence demonstrates that the loan in issue was advanced on 17.01.17 and was repayable in monthly installments of Kshs. 12,784.23. The statement further demonstrates that the Respondent faithfully paid up to July, 2017 and thereafter defaulted. He later made a payment of Kshs. 63,708/- on 04.01.17 and had not made any other repayment as at 09.06.18 when repossession was effected.

8. The evidence on record reveals that instructions to repossess the motor vehicle were issued by the 1<sup>st</sup> Appellant to the 2<sup>nd</sup> Appellant by a letter dated 07.06.2018 and the repossession was effected on 09.06.18 which was 6 months after the last payment by the Respondent.

9. The trial court found as a fact that the Respondent had not demonstrated by way of any document or otherwise that he had repaid the agreed monthly sum of Kshs. 12,784.23 as agreed. Evidently, the Respondent was in arrears at the time of repossession.

#### Was the repossession lawful

10. As clearly pointed hereinabove, the Respondent was in arrears at the time of repossession. And whereas the Respondent did not in his pleadings raise the issue of notice before repossession, the trial court found that the repossession was unlawful on account of failure by the 1<sup>st</sup> Appellant to issue a demand notice.

11. I have considered the provisions in the *Letter of Offer* and the *Chattels Mortgage* and there was no requirement for notice before repossession. I have also considered the plaint and the Respondent neither pleaded lack of notice before repossession nor non-compliance with the Auctioneers Rules.

12. In **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, the Court of Appeal restated the legal position that parties are bound by their pleadings and cited with approval the Nigerian Supreme Court decision in **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC** S.C. 91/2002, where Judge Pius Aderemi J.S.C. expressed himself, as follows;

**“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

13. The foregoing clearly demonstrates that the trial court’s finding that the 1<sup>st</sup> Appellant was under an obligation to issue a notice before repossession was a complete departure from the pleadings. Even if the Respondent raised the issue in his evidence, this was completely at variance with its pleadings which is not permissible.

14. The decision by the trial court therefore amounts to rewriting the contract between the parties. A Court of Law cannot rewrite a Contract. The Court only interprets and enforces the intention of the parties. **In National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and Another (2002) EA 503** the court of Appeal stated: -

**“A court of law cannot rewrite 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd V Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”**

#### **Did the Respondent meet the threshold for the grant of a permanent injunction**

15. As clearly pointed out hereinabove, the Respondent was in arrears at the time of repossession. The permanent injunction that was sought is in the nature of a mandatory injunction. The legal meaning assigned to the relief of a Mandatory Injunction in the Black’s Law Dictionary, 7th Edition is: -

**"An injunction that orders an affirmative act or mandates a specified course of conduct".**

16. A permanent injunction as was granted in this case requires a higher level of proof than ordinary injunctions. Upon applying these principles, I find that the Respondent had come to court with unclean hands and was not entitled to an equitable remedy. I therefore find that the learned trial magistrate misdirected himself in granting the permanent injunction, as to begin with, the Respondent was in arrears and the court had reached the wrong conclusion that the Respondent was entitled to a notice before repossession and that there was non-compliance with the Auctioneers Rules.

17. On the material before the court, I am satisfied that this appeal has merit and is allowed in the following terms:

**1) The Judgment and Orders dated 15.07.19 issued in Kisumu CMCC No. 278 of 2018 are set aside and substituted with an order dismissing the Respondent’s suit with costs to the Appellants**

**2) The Respondent is condemned to pay the costs of this appeal.**

**DATED THIS 28<sup>th</sup> DAY OF July 2020**

**T. W. CHERERE**

**JUDGE**

***JUDGMENT***

**Court Assistant**

**- Ms. Amondi/Ms. Okodoi for the Appellant**

**- Mr. Dachi for Nyaanga & Mugisha Advocates for the Respondent**

**- Mr. Ouma for Odhiambo Ouma & Co. Advocates**

**Order**

**This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID - 19 pandemic.**