



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL DIVISION**

**CIVIL APPEAL NO. 336 OF 2010**

**K-REP BANK LIMITED .....APPELLANT**

**-VERSUS-**

**JOHN MOCHAMA ONCHOKE.....RESPONDENT**

**( Being An Appeal Against The Ruling/Order Of The Hon. Principal Magistrate Mr. Okato  
Delivered On The 6<sup>th</sup> Day Of August 2010 In The Chief Magistrate's Court At Nairobi Milimani  
Commerical Courts In Cmcc No. 2664 Of 2010)**

**BETWEEN**

**JOHN MOCHAMA ONCHOKE.....PLAINTIFF**

**-VERSUS-**

**K-REP BANK LIMITED .....DEFENDANT**

**JUDGMENT**

1. The Respondent filed a suit in the Lower Court on the 4<sup>th</sup> of May 2010 via a plaint dated the same day. Simultaneously on the same the day the Respondent filed a Chamber Summons application seeking injunctive orders against the appellant seeking to restrain the appellant from selling or auctioning or attaching motor vehicle KAR 334 Q Nissan matatu. He also sought a stay order against the sale scheduled on the 5<sup>th</sup> day of May 2010 for the said vehicle KAR 334Q.
2. The application was heard and on the 6<sup>th</sup> of August 2010 Hon. Okato delivered a Ruling. Mr. Okato ruled that the repossession done by the appellant was unlawful as the plaintiff had established a prima facie case with probability of success and he allowed the application. His reasoned that the appellants had not annexed to their replying affidavit any contract document; that there was no evidence that the repossession and subsequent proclamation attachment and advertisement of the vehicle was provided in the car; that by failing to annex the contract documents the appellant had denied the access to the terms and conditions of the loan agreement and that since the attachment was not pursuant to a court warrant then the repossession could only be justified and legal if provided for in the contract document; that Rule 12 ( c) of the Auctioneers rules provided that upon receipt of a court warrant or letter of instruction the auctioneer shall in case of moveable's other goods of a perishable nature and livestock in writing , give to the owner the goods seven days notice in sale form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrants or letter of instructions; that he

had perused the letter of instruction exhibited to the replying affidavit and found that the amount that the respondent was to pay was not set forth in the letters of instructions as mandatory provided for in Rule 21 ( c ).

3. The appellant being aggrieved by the said decision filed this appeal and the main grounds of appeal are set out as follows in the Memorandum of Appeal filed on the 25<sup>th</sup> of August 2010;

- i. That the Learned Magistrate erred in law and fact in disregarding the appellant evidence
- ii. That the Learned Magistrate erred in law and in fact in disregarding the appellant's evidence.
- iii. That the learned Magistrate erred in law in failing to follow laid down principles of law in granting interlocutory injunctions especially in disregarding the settled principles in *Geilla Vs. Cassman Brown & Co. Ltd (1978) EA 358*.
- iv. That the Learned Magistrate erred in law and in fact in finding that the Respondent had established a prima facie case with a probability of success.
- v. That the Learned Magistrate erred in fact and in law in misdirecting himself on the law and facts especially in finding that the attachment of the Respondent's motor vehicle was unlawful.
- vi. That the Learned Magistrate erred in fact and in law in misdirecting himself on the law and facts especially in finding that the appellant had not complied with the requirements of Rule 12(c) of the Auctioneers Rules 1997 while the evidence on record confirmed the appellant's compliance with the requirements.
- vii. That the Learned Magistrate erred in law and in fact in disregarding the Appellant's submission and especially that the motor vehicles registration number KAR 334Q Nissan Matatu was a security being realized for a loan which was not performing.
- viii. That the learned Magistrate erred in law and in fact in being openly biased towards the Respondent's weak case and applying principles unknown and unestablished in law.

4. Parties argued this appeal by way of written submissions. The appellants submitted as follows; that the Respondent did not show he had a prima facie case to be granted an injunction; that the Respondent defaulted in servicing the loan; that learned Magistrate should have restrained himself to the principles of equity before granting an injunction; that being a defaulter the Respondent should not have enjoyed equitable remedies, for this he relied on the case of *Kyangaavo vs. Kenya Commercial bank Ltd (2004) KLR 126* where Justice Njagi held that an injunction is sought in an equitable remedy. He that comes to equity must come with clean hands and must also do equity"; that the lender also has rights which the court is duty bound to safeguard; that the lower court disregarded the rights of the appellant and as such occasioned great economic losses and prejudice on the part of the appellant; that court has the mandate , power and discretion to correct the mistake made by the lower court as was held in the case of *Zadrack Oyaro Achoki & Grace Kemunto Mokua vs. Consolidated Bank of Kenya Limited Civil case No. 739 of 2012*; that the Learned Magistrate erred in law and in fact in granting the Respondent an injunction and not requiring them to play their role of servicing the loan, that the appellant continues to suffer loss yet the Respondent continues to enjoy the injections unconditionally; that the learned Magistrate failed to consider that the vehicle had a value that could be ascertained and that the Respondent's loss could be quantified in damages; that considering the circumstance the balance of convenience tilted in the appellants favor as the Respondent failed to clear the outstanding loan to date; that the Magistrates finding on Rule 12 ( c ) was wrong that the provision of the said rule are clear and that the auctioneer followed the said procedure and that the learned Magistrate misinterpreted the provisions of the said rule and that the attachment was legal and lastly that the learned Magistrate failed to consider the evidence adduced by the appellant that the correct procedure had been followed all along up to the time of advertising the chattel for auction.

5. The Respondent submitted as follows; that the appellants had nothing to allow them to attach the vehicle; that the appellant used unlawful means to impound the vehicle; that the appellant has not accounted for all the monies deposited with them and the repayment done so far, not have they disclosed the interest rate used; that the vehicle that is being held by the appellant should be released to the Respondent ; that the vehicle if it was used as a security to secure the repayment of any money was to be jointly owned with the appellant to enable them have the legal backing to attaché and sell in the obscene of the unlawful, null and void and untenable in and that the appeal

should be dismissed.

6. I have considered the submissions, the cases relied on, the proceedings of the lower court. The main ground of appeal in this case is whether the magistrate erred in finding that he respondent had established a prima facie case. In his ruling dated 6<sup>th</sup> August 2010 the learned magistrate noted that there was no dispute that the plaintiff had been granted a loan and that the plaintiff fell into repayment errors subsequent to which the vehicle had been proclaimed. He noted that what was in dispute was whether the proclamation attachment and advertisement was legal. In his ruling he noted that the defendant/appellant had not annexed the contract document and therefore there was no evidence that the repossession and subsequent proclamation attachment and advertisement was provided for in the contract. The learned Magistrate stated that by failing to annex the contract document the defendant had denied the court access to the terms and conditions of the loan agreement and that since the attachment of the vehicle was not pursuant to a court warrant then the repossession could only be justified and legal if the contract document was provided. I find nothing wrong with this decision. It was upon the defendant/appellant to produce the contract document that authorized it to attach the vehicle in the manner in which it did. Without the said document the court as stated was denied access to evaluate the terms and conditions of the loan agreement. In the said ruling it was also held that Rules 12 (1) (c) was not complied with. The provisions of Rule 12 (1) (c) stipulates that;

*12 (1) upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of movable other than goods of a perishable nature and livestock.*

*(c) in writing, give to the owner of the goods seven days notice In sale form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;*

7. I have looked at the notification of sale of movable property and it does not bear the amount the plaintiff was to pay. He agreed with the learned magistrate’s findings that the provision of Rule 12 (c) are mandatory and the defendant/appellant failed to comply and it is on this basis that the plaintiff was granted an injunction. The cases cited relied on by the appellant were cases where proper statutory notices were served on the respective defaulters. However I do note that the Respondent/Plaintiff admits it is in arrears. In my view the defendant appellant should serve a proper notification of sale as required in law, the parties should have a meeting and determine the amount in arrears. The appeal is therefore dismissed. The file shall be returned to the lower court for the parties to proceed with the hearing and determination of the suit. No orders as to costs.

Orders accordingly.

Dated, signed and delivered this 25<sup>th</sup> Day of November 2014.

**R. E. OUGO**

**JUDGE**

In the Presence of:

.....Appellant

.....Respondent

.....Court Clerk