REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 128 OF 2007

MERCY WAMBUI THUO ..... APPELLANT

VERSUS

K-REP BANK ..... RESPONDENT

(Appeal from original Ruling of the Senior Principal Magistrate's Court at Nanyuki in Misc. Application No. 23 of 2007 dated 14th November 2007 by H. N. Ndung'u (Miss) – Ag. SPM)

J U D G M E N T

K-Rep Bank Limited, hereinafter referred to as "the respondent" on or about 24th August 2006 advanced a loan facility to the appellant, **Mercy Wambui Thuo** of Kshs.100,000/= at her request and instance. The appellant was to repay the loan facility by equal weekly remittances of Kshs.2,230/76 with effect from 24th September 2006. As security, the appellant pledged her household goods. Indeed it was an express term of the agreement that in the event that she defaulted in repaying her loan aforesaid then the respondent would be at liberty to attach and sell by public auction those household goods.

Subsequently the appellant defaulted and was unable to clear the outstanding sum of Kshs.34,499/88. The respondent acting within the terms of the agreement and pursuant to a security declaration by way of an affidavit instructed **Chim Agencies (K) Ltd**, a Company associated with debt collection and repossession amongst other activities to repossess and auction the appellant's household goods aforesaid. The appellant had savings with the respondent to the tune of about Kshs.35,000/=. She requested that the same be applied so as to offset her outstanding loan aforesaid. However the respondent could hear none of the proposal since the appellant had committed the said amount as security to another loan advanced to one **Agnes Wanjiru Rugenyi** by the respondent whose loan at the time stood a Kshs.176,569/76. Since the appellant had committed her savings aforesaid as security for the loan advanced to the said **Agnes Wanjiru Rugenyi**, there was no savings to be set off against her loan balance.

Acting on the instructions of the respondent aforesaid, **Chim Agencies (K) Ltd** moved to secure the household goods. However they could not gain access to the appellant's house. Apprehensive that the appellant was likely to move and or hide the goods pledged as security from being repossessed and auctioned in satisfaction of the said loan balance hence subject the respondent to great loss and damage, the respondent moved to court by way of Notice of Motion seeking a break in order. The application was heard exparte and granted on 13th July 2007. However by an application dated 26th September 2007 brought by way of Notice of Motion pursuant to order XXI rule 22 of the civil procedure rules and section

3A of the civil procedure Act, the appellant sought as against the respondent as well as **Chim Agencies (K) Ltd** orders for the release to her of the attached goods. The application was made on the grounds that the said goods were unlawfully attached and were about to be sold by private treaty and further that the appellant did not owe the respondent any money to warrant the attachment. That the suit was irregularly commenced by way of a miscellaneous application and finally that the warrants of attachment were issued pursuant to none existent decree and therefore execution could not lie.

As expected, the application was vehemently resisted on the grounds that the appellant had admitted having borrowed a loan from the respondent and repaid the same leaving a balance of about Kshs.35,000/=. She had savings with the respondent amounting to also Kshs.35,000/= and wanted her loan aforesaid offset from those savings. However, since she had committed her said savings as security to another loan advanced to another person, there were no savings to offset her loan balance.

The learned magistrate having carefully considered the issues at hand found for the respondent and dismissed the application holding interlia:-

"**I have addressed myself to all the issues herein and I have carefully read all the affidavits and annextures thereto. There is no dispute the Applicant was advanced by K-rep Bank the Respondent herein a loan of Kshs.100,000/=. She has repaid part of that amount leaving a balance of about 35,000/= or 34,499.88cts. (This was not exactly clarified by any of the parties hence the 2 figures above). It is also apparent from annexture GMIA that the applicant further guaranteed as security a loan advanced to one Agnes Wanjiru Rugenyi who has now a balance of Kshs.176,569.76. From GMI(a) it is clear the Applicant herein Mercy Wambui Thuo is one of the guarantors for Agnes Wanjiru Rugenyi to the tune of Kshs.35,500/= being her savings. She therefore cannot turn around and say that with the same savings she wants to offset her own loan balance. This matter is a matter that speaks for itself and it is not true to say that the Applicant's goods have been unlawfully attached through Chim Agencies nor is it true to say that the Applicant owes the Respondent nothing for indeed she does owe as she freely admits and although she has savings with her self help group she has also committed those savings towards guaranteeing another of her group members above mentioned.**

Finally may I point out that contrary to Mr. Wanjohi (sic) submissions this suit was not irregularly commenced merely because it was done by a miscellaneous application and heard exparte – one only needs to look at the K-Rep Bank loan application forms and the attached affidavit therein to see that members taking loans within the self help groups such as which the applicant was or is a member usually bind themselves to the effect that if they fail to service the loans or any part thereof as agreed between K-Rep Bank, the group and the member (such as the applicant herein) they forego and surrender for sale by way of public auction or private treaty all the properties they give as guarantee which list is also part of the annexture to the loan application form. If what the applicant freely bound herself to takes place she cannot turn around and cry foul for I believe the bank would be free to even sell the property of a defaulter without needing to come to court. I therefore dismiss this application with costs and direct that the sale of the attached goods proceeds, unless the applicant soonest pays the amount she owes K-Rep Bank which amount is well within the knowledge of both parties."

That ruling provoked this appeal. Through **Messrs Wambugu, Mureithi & Co. Advocates**, the appellant has faulted the ruling on 5 grounds to wit;

"**1. That the learned trial magistrate erred in law**

in failing to find that there was no decree

capable of execution.

2. That the learned trial magistrate erred in law

and fact in exercising jurisdiction over illegal

and irregular proceedings.

3. That the learned trial magistrate erred in law

and fact in entertaining proceedings which

were unlawful and unprocedural.

4. That the learned magistrate misdirected

herself by sanctioning a sale encumbered by

illegalities.

5. That the learned trial magistrate ruling and

order was wrong in law."

When the appeal came up before **Kasango J** on 6th March 2009, she directed with the consent of all the parties that the same be heard by way of written submissions and the said submissions be filed and exchanged by 27th April 2009 when the appeal could be mentioned for further orders and or directions. On this occasion respective parties had filed and exchanged written submissions. However **Kasango J**. declined to handle the appeal any further as she was on transfer to the High Court of Kenya at Meru. The appeal then came before me for directions on 8th June 2009. **Mr Wanjohi** and **Mr. Liko** learned counsel for the appellant and respondent respectively agreed that I proceed with the appeal from where **Kasango J**. had left.

I have carefully read the record, the written submissions and the authorities cited. The starting point in considering this appeal is whether the appeal as filed is competent. I say so because, the order appealed from was never extracted and made part of the record. The record of appeal talks of "**an appeal from the ruling of Hon. H. N. Ndung'u (Miss) Senior Principal Magistrate Court Nanyuki Misc. Application No. 23 of 2007 delivered on 14th day (sic) November 2007...."** Much as a party can appeal against a ruling, such ruling must be reduced into an order duly signed and or extracted from the court. That duly extracted order must form part of the record. In the absence of such an order as is the case in this appeal renders in my respectful opinion the instant appeal incompetent.

Secondly, even on the merits of the appeal, I still think that the appeal lacks merit. The appellant seems to have misapprehended the process that landed her in court. There was no suit filed. The agreement she entered into with the respondent did not contemplate such suit. As part of security for the loan she had acquired from the respondent, she surrendered her household goods. It was an express term of the agreement that in the event she defaulted in the repayment of the loan, the respondent was at liberty to exercise its right to repossess the household goods and sell them through public auction or even private treaty. This is the option that the respondent exercised when the appellant fell not arrears. That being the case, it was not mandatory nor necessary that the respondent first files suit against the appellant. The appellant herself admitted in writing that she was in loan arrears to the tune of about Kshs.35,000/= and had in fact requested the respondent to offset the loan with her savings held by the respondent. However the respondent could not accede to her request as her said savings were tied up as security to the loan that she had guaranteed one, **Agnes Wanjiru Rugenyi**. In a nutshell, the appellant cannot be heard to claim that she did not owe the respondent any money in loan arrears. Courts do not make agreements for parties. Courts only interpret agreements and enforce them barring any illegalities. In the circumstances of this case, the appellant freely and voluntarily entered into an agreement with the respondent. The terms may have been harsh and perhaps unconscionable, however, I do not discern any illegality. After all the appellant had opportunity to refuse not to enter into the agreement. She did not. Indeed she signed

the agreement with her eyes wide open. Yes the respondent could have sued her. However under the agreement that is a last option.

The respondent only went to court for a break in order. Accordingly it is not correct as submitted by the appellant that the trial magistrate erred in law in failing to find that there was no decree capable of execution. Apparently, the appellant knowing very well what was likely to befall her since she had defaulted her loan repayments had made it difficult for the respondent to repossess the household goods so that they may be sold in terms of the agreement. In other words she had kept house locked. This compelled the respondent to seek a break in order from the court. In so doing, the respondent was not initiating a suit against the appellant by way of a miscellaneous application. All that the respondent was seeking was court's assistance so that it may get its hands on the household goods for purposes of selling them by public auction. In those circumstances, no decree was necessary. Nor can it be said that by the learned magistrate allowing the application for a break-in order, she was exercising jurisdiction over illegal, irregular or unlawful proceedings. The learned magistrate had been properly moved under section 3A of the civil procedure Act. The respondent was merely asking the learned magistrate to invoke her inherent jurisdiction and make such order as will meet the ends of justice. Miscellaneous application is a recognised procedure of moving a court for appropriate remedy. In any case there were no execution proceedings as such. Contrary to the submissions of **Wanjohi**, the respondent did not just move to the Senior Principal Magistrate's Court ex-parte and obtained orders to attach the appellant's properties for an alleged debt. All that the learned magistrate did was to grant an application for a break in order. Ordinarily those orders are granted ex-parte so that the one against whom it is directed does not get wind of it so that he puts into gear efforts to frustrate the possible outcome. Accordingly, there was no need to hear the appellant on the application. I do not think therefore, in presiding over the application, the learned magistrate acted outside her jurisdiction and in the process sanctioned an illegality.

I think what I have said is sufficient to dispose off this appeal. I do not wish to consider as urged by **Liko**, whether the relationship between the appellant and respondent was governed by the Chattels Transfer Act. The agreement entered into by the two makes no reference to the said Act. In any event the issue was never canvassed before the learned magistrate. The end result is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE