



REPUBLIC OF KENYA



**Muoria & another v Credit & another (Commercial Appeal E045 of 2020)  
[2025] KEHC 1412 (KLR) (Commercial and Tax) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1412 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E045 OF 2020  
CJ KENDAGOR, J  
FEBRUARY 21, 2025**

**BETWEEN**

**GEORGE MUORIA ..... 1<sup>ST</sup> APPELLANT  
BEATRICE NYAKIO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SYNERGY INDUSTRIAL CREDIT ..... 1<sup>ST</sup> RESPONDENT  
EXCELL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment delivered on 21st August, 2020 by Hon. Kagoni E.M, PM in Chief Magistrates Court Milimani Commercial Civil Suit 2340 of 2017)*

**JUDGMENT**

**Introduction**

1. The 1<sup>st</sup> Respondent entered into a Hire-Purchase Agreement with the Appellants on 19<sup>th</sup> January, 2008. Under the Agreement, the Appellants hired Motor-Vehicle No KAV 249M and a Trailer No. ZC 7843. The terms of the Hire-Purchase were as follows; a Deposit of Kshs.2,800,000/=, 35 equal consecutive monthly instalments of Kshs. 225,667/= and a 36<sup>th</sup> final instalment of Kshs.225,667/= . The total hire purchase price of the goods inclusive of option to purchase charges and the deposit was Kshs.10,784,000/=.
2. The Appellants paid the Deposit and took possessions of the goods and started remitting the monthly instalments. However, after some time, they fell into arrears and the 1<sup>st</sup> Respondent terminated the Hire-Purchase Agreement and demanded delivery of the said Motor Vehicle and the Trailer. The Appellants failed to deliver then and concealed their whereabouts. For this reason, the 1<sup>st</sup> Respondent



could not establish the exact location of the hired goods and was thus unable to repossess the hired motor vehicles. The 1<sup>st</sup> Respondent sued the Appellants and the 2<sup>nd</sup> Respondent claiming a sum of Kshs.7,481,382/=.

3. The Court delivered a judgment on 21<sup>st</sup> August, 2020 in which it entered judgment for the 1<sup>st</sup> Respondent against the Appellants and the 2<sup>nd</sup> Respondent jointly and severally for Kshs.7,481,382/=. It also awarded the 1<sup>st</sup> Respondent contractual interest accrued from date of breach to date of filing suit. It found there was a valid Hire Purchase Agreement between the 1<sup>st</sup> Respondent and the Appellants. It also found that there was a valid Letters of Guarantee and Deed of Assignment between the 1<sup>st</sup> Respondent and the Appellants and the 2<sup>nd</sup> Respondent, in which the 2<sup>nd</sup> Respondent guaranteed the payment of all monies owed to the 1<sup>st</sup> Respondent by the Appellants under the Hire-Purchase Agreement.
4. The Court also found that the Appellants breached the Hire Purchase Agreement and that it had a right to be paid the arrears upon default by the Appellants. The court awarded the 1<sup>st</sup> Respondent Kshs.7,481,382/=: being cumulative of both the price of the goods as well as late charges. It also gave the 1<sup>st</sup> Respondent contractual interests from 31<sup>st</sup> January, 2015. It reasoned that the award for contractual interest was a reasonable award because the parties had entered into a legally binding agreement for economic purposes.
5. The Appellants were dissatisfied with the Judgment and sought a review of the Judgment in the lower Court through an application dated 4<sup>th</sup> September, 2020. In the Review Application, they sought the following orders;
  - a. The Judgment entered in the sum of Kshs.7,481,382/= be reduced to Kshs.3,842,740/=.
  - b. The Judgment entered in the sum of Kshs.3,842,740/= be against the [2<sup>nd</sup> Respondent].
  - c. Contractual interests from the date of breach to the date of filing suit be expunged from the Decree.
  - d. Execution of the decretal amount of Kshs.3,842,740/= be against the [2<sup>nd</sup> Respondent] through its Directors Joseph Kariuki Kanyuaigwa and Lydia Wanjiru Kariuki.
6. The lower Court heard the application and delivered a ruling on 28<sup>th</sup> October, 2020 in which it dismissed the Appellants' application for review.
7. While the Application for Review was still pending before the lower Court, the Appellants lodged this appeal vide a Memorandum of Appeal dated 21<sup>st</sup> September, 2020. They sought to appeal against the Judgment of the lower Court delivered on 21<sup>st</sup> August, 2020 and they listed the following Grounds of Appeal;
  1. That the learned trial magistrate erred in law and fact by failing to find that the decretal amount is Kshs.3,842,740/= as per the hire purchase agreement and not Kshs.7,481,382/= as prayed for as the Appellants had already paid Kshs.4,000,000/= more than 50% of the Hire Purchase amount.
  2. That the learned trial magistrate erred in law and fact in failing to find that the 2<sup>nd</sup> Respondent was the only one with a contractual obligation of paying the balance to the 1<sup>st</sup> Respondent as he us the sole beneficiary of the Hire Purchase agreement
  3. That the learned trial magistrate erred in law and fact by failing to find that the 1<sup>st</sup> Respondent should repossess the goods as a result of non-payment by the Appellants and 2<sup>nd</sup> Respondent.



4. That the learned trial magistrate erred in law and fact by failing to find that the 2<sup>nd</sup> Respondent was contractually obliged to pay all amounts due under the Hire Purchase on the part of the Appellants.
5. That the learned trial magistrate erred in law and fact by finding that the Appellants are liable to pay contractual interest as no specific rate yet the same is imaginary as it was not provided for in the Hire Purchase Agreement between the Appellants and 1<sup>st</sup> Respondent.
6. That the learned trial magistrate erred in fact and law in making a determination as follows:
  - a. Judgment is accordingly entered for the [1<sup>st</sup> Respondent] against the [Appellants and the 2<sup>nd</sup> Respondent] jointly and severally for Kshs.7,481,382/= as prayed in the Plaint.
  - b. Contractual interest will accrue from date of breach to date of filing suit.
  - c. Interest on the decretal sum as court rate will accrue from date of filing suit till payment in full.
  - d. The [1<sup>st</sup> Respondent] is awarded costs of the suit.

In doing so, the trial court ignored the following;

  - a. That the only amounts owed to the 1<sup>st</sup> Respondent is Kshs.3,842,740/= as per the hire purchase agreement.
  - b. That as per the letter of guarantee/undertaking and agreement of assignment the 2<sup>nd</sup> Respondent was to pay all amounts due in the hire purchase agreement on behalf of the Appellants.
  - c. That the hire purchase goods are in the care of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent should repossess the same from them.
  - d. That it is trite law that in the event of default to pay instalments in a hire purchase agreement, the 1<sup>st</sup> Respondent should repossess the goods.
8. They asked the court to allow the Appeal and set aside the Judgment of the Chief Magistrates Court at Milimani dated 21<sup>st</sup> day of August, 2020. They also asked the Court to find that the only amounts owing to the 1<sup>st</sup> Respondent be determined as Kshs.3,842,740/= as per the Hire Purchase Agreement and without any interest thereon. In addition, they requested this Court to find that as per the letter of guarantee/undertaking and agreement of assignment the 2<sup>nd</sup> Respondent do pay all the amounts due in the hire purchase agreement on behalf of the Appellants. Lastly, they asked this Court to hold that the 1<sup>st</sup> Respondent should repossess the hire purchase goods as agreed in the hire purchase agreement.
9. The appeal was canvassed by way of written submissions.

### **The Appellants' Written Submissions**

10. The Appellants submitted that the lower Court captured the wrong figures as the outstanding balance. They argued that the Hire Purchase price was Kshs.7,980,000/= out of which they had paid Kshs.4,806,261/=. Therefore, they argued that the remaining debt should be Kshs.3,842,740/= and not the figure captured in the judgment. They argued that the judgment should be quashed because it will subject them to a loss of Kshs.4,806,261/= already paid to the 1<sup>st</sup> Respondent. They also argued that the trial Court should not have awarded the 1<sup>st</sup> Respondent contractual interest because the hire purchase agreement did not provide for any interest to be awarded upon default of payment.



## **1<sup>st</sup> Respondent's Written Submissions**

11. The 1<sup>st</sup> Respondent submitted that the Appellants do not have a right to pursue the current Appeal because they had earlier applied for a Review of the Lower Court Judgment. It argued that the Appellants, having opted to apply for review of the Judgment of the lower Court, cannot seek to appeal from the same judgment as this would be in breach of Section 80 of the *Civil Procedure Act* and Order 45 (2) of the Civil Procedure Rules, 2010. It argued that the above provisions are explicit that a party has the option to choose whether to appeal or seek review. It submitted that there is no liberty for a party to seen both Review and Appeal simultaneously, contemporaneously or in a consecutive manner over the same judgment or order.
12. It argued that the Appellants' application for review was heard on the merit and the Court found no merit on it and dismissed the same. It submitted that the only recourse available for the Appellants in the circumstances would be an appeal on the ruling on Application for Review delivered on the 28<sup>th</sup> October, 2020. For these reasons, it submitted that the Appellants should not be allowed to pursue this Appeal because they do not have a right of appeal before this Court. It relied on the case of *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR and *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR.

## **Issues for Determination**

13. Having looked at the Grounds of Appeal and submissions from both parties, I find that there are two issues for determination.
  - a. Whether the Appellants had the right to lodge this Appeal
  - b. Whether the lower court's award was erroneous
14. The two issues are related to each other because the finding on the first issue will inform whether this Court will investigate the second issue. If the Court finds the Appellant's Appeal is competent, it will go ahead and investigate the second issue. However, if the court finds that Appellant's did not have a right to lodge the instant Appeal, then the Court will not look at the second issue.

## **Whether the Appellants had the right to lodge this Appeal**

15. The 1<sup>st</sup> Respondent submitted that the Appellants do not have a right to pursue the current Appeal because they had earlier applied for a Review of the judgment at the lower and the same was heard on merit and dismissed.
16. I have relooked at the Record of Appeal to ascertain whether the Appellants sought review at the lower Court as alleged. I have ascertained that indeed the Appellants filed an application for Review at the lower Court on 4<sup>th</sup> September, 2020 in which they asked the lower Court to review its judgment delivered on the 21<sup>st</sup> August, 2020. I have also seen a Ruling of the lower Court dated 28<sup>th</sup> October, 2020 in which the lower Court dismissed the application for reasons that the Appellants had not met the threshold required for review. I have read the prayers sought in the said application and the ruling and I have confirmed that the application for Review was heard and determined on merit.
17. Having found as outlined above, did the Appellants have the right to lodge this appeal against the judgment of the lower Court delivered on 21<sup>st</sup> August, 2020? The 1<sup>st</sup> Respondent submitted that the Appellants did not have the right to bring this appeal because there is no liberty for a party to seen both Review and Appeal simultaneously, contemporaneously or in a consecutive manner over the same judgment or order.



18. To determine this issue, it is prudent to interrogate the provisions of Section 80 of the *Civil Procedure Act* and Order 45 (2) of the Civil Procedure Rules.

19. Section 80 of the *Civil Procedure Act* provides as follows:

“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

20. Order 45 Rule 1(b) of the said Rules, provides as follows:

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

21. The Court of Appeal in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR interpreted the above provisions in the following terms;

“The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against



the same order ...” See also the case of Multichoice (K) Ltd v Wananchi Group (K) Ltd & 2 Others (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.”

22. The High Court recently adopted the same reasoning in the case of Ndithya v Total Kenya Limited (Miscellaneous Civil Application E218 of 2021) [2022] KEHC 10080 (KLR), where the Court held as follows;

“ 23. It is clear from the foregoing that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time.

31. Accordingly, I associate myself with the said decisions (Gerald Kitu Muchanje Supra) that both options cannot be pursued concurrently or one after the other”.

23. Based on the above authorities, I find that the Appellants did not have the right to appeal the judgment of the lower Court to this Court, having previously pursued a review of the said judgment before the lower Court. The appeal is incompetent and is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

24. Having found that the Appeal is incompetent, the second issue for determination becomes moot and this Court shall not determine the same.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

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**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Mr. Meme Advocate for 1<sup>st</sup> Respondent

No attendance for 2<sup>nd</sup> Respondent

No attendance for Appellants

