



**Co-operative Bank of Kenya & another v Francis Nick Odhiambo t/a Faja Investments  
(Civil Appeal E157 of 2023) [2025] KEHC 2385 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E157 OF 2023  
MA OTIENO, J  
MARCH 6, 2025**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA ..... 1<sup>ST</sup> APPELLANT**

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

**AND**

**FRANCIS NICK ODHIAMBO T/A FAJA INVESTMENTS ..... RESPONDENT**

*(Being an appeal from the decision of Hon. G. N. Barasah (SRM)  
delivered on 21 st August 2023 in Kisumu CMCC No. 406 of 2015)*

**JUDGMENT**

**Introduction**

1. This is an appeal from the judgment and decree of the lower court in the Kisumu CMCC No. 406 of 2015, delivered on 21<sup>st</sup> August 2023. In the lower Court, the respondent herein Francis Nick Odhiambo T/A Faja Investments (then a plaintiff), vide a Plaint dated 6<sup>th</sup> August 2015 instituted proceedings against the Appellant herein seeking the following prayers;-
  - a. A declaration that the said proclamation is illegal.
  - b. A permanent injunction against the Defendants by themselves, their agents or servants from interfering the Plaintiff's stocks. assets and household goods.
  - c. Costs of this suit.
  - d. Interest on costs.
2. It was the respondent's (plaintiff's) case before the trial court that on 30<sup>th</sup> July 2015, the 2<sup>nd</sup> appellant issued a proclamation notice against the respondent on the ground that it owed the 1<sup>st</sup> appellant a



sum of Kshs. 847, 067.90/= from a loan facility advanced by the appellant to the respondent. The respondent alleged that the sum claimed was not correct and did not disclose the correct position of the account concerning the loan facility.

3. In response to the suit, the appellants(the bank) entered appearance and filed a statement of defence dated 9<sup>th</sup> September 2015. In the defence, the bank stated that on 30<sup>th</sup> July 2015, the respondent was proclaimed in the recovery of a loan debt of Kshs. 847,067.90/=. The bank (then a defendant) pleaded that sometime in March 2012, the Appellant advanced to the Respondent a working capital loan in the sum of Kshs. 1,200,000/= at the interest rate of 2% per month, and the facility was to be repaid within 12 months in equal monthly installments of Kshs. 124,000/=: payable on the 10<sup>th</sup> day of every month. That as security for the loan, the respondent executed in favour of the appellant, a chattels mortgage in respect of motor vehicle registration number KAM 296G, motor vehicle registration number KBP 963V, as well as several household goods as business chattels.
4. The appellants/bank stated in their defence that the capital loan facility was subject to an interest of 2% per month with provisions that the facility was to be repaid in 12 months equal monthly installments of Kshs. 124,000/= each. The appellants averred that the loan ought to have been paid by March 2013, but the plaintiff failed to service the facility and defaulted despite several notices of default and demand, hence the proclamation.
5. The Trial court delivered its judgment on 21<sup>st</sup> August 2023 in favour of the respondent. In its judgment, the trial court found, among other things, that the proclamation was illegal since the Chattels Mortgage, the instrument which the bank sought to execute, was not registered.

### **The Appeal**

6. Dissatisfied with the said judgment and decree, the appellants preferred an appeal before this court vide a Memorandum of Appeal dated 19<sup>th</sup> September 2023, raising the following eleven (11) grounds of appeal;
  - i. The learned trial magistrate erred in law and in fact in reaching a determination on the suit before her that the proclamation instituted by the Appellants was illegal solely on the basis that the 1<sup>st</sup> Appellant failed to register the Chattels Mortgage instrument, without taking into consideration the submissions by the Appellants that though it was not denied that the chattels instrument was not registered, such non registration did not affect the obligations of the parties under the agreement, and that the parties wilfully executed an inter partes contract which, by definition, is enforceable as between them in accordance with the basic tenets of the law of contract.
  - ii. The learned trial magistrate erred in law and in fact by failing to appreciate or otherwise take cognizance of the import of the requirement for registration under the Chattels Transfer Act, Chapter 28 Laws of Kenya, particularly Section 13 thereof, and failed to appreciate and address herself on the submissions by the Appellant to the effect that the purpose of registration is to protect the Creditor against claims by third parties, by serving as a formal notification that the securities attached are subject of an encumbrance in favor of the registered Creditor, and that the absence of such registration does not diminish the responsibilities of the Debtor and the Creditor under the agreement, or invalidate the same.
  - iii. The learned trial magistrate erred in law and in fact in failing to appreciate that the 1<sup>st</sup> Appellant's security interest in the secured property became effective and realizable once the Chattels Transfer Instrument was signed by the parties, the non-registration notwithstanding.



- iv. The learned trial magistrate erred in law and in fact by failing to appreciate or otherwise take cognizance of the fact that the 1<sup>st</sup> Appellant, having filed a comprehensive statement of accounts itemizing the history of the transactions between itself and the Respondent from the date the loan was disbursed to the date the suit was instituted together with documentation in support of the interest charged on the principal sum, had provided conclusive proof and prima facie evidence of the Respondent's indebtedness to it in the terms of Section 176 of the Evidence Act, Cap 80 Laws of Kenya, and such proof could only be rebutted by evidence to the contrary being provided by the Respondent in terms of Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya, which was not done.
- v. The learned trial magistrate erred in law and in fact by reaching a finding that the proclamation was based on improperly calculated figures and illegal calculations of the outstanding arrears on the loan and thus declared the same illegal, yet the particulars of such improper and/or illegal calculations as alleged were not pleaded or supplied at trial by the Respondent, and the Respondent did not file any evidence or documents forming the basis of these allegations whether by an auditor's independent report or otherwise. The court's determination was therefore based on untested and unsubstantiated claims void of the evidentiary support required under Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya.
- vi. The learned trial magistrate erred in law and in fact in failing to appreciate that in light of the clear contractual agreement by the parties on the interest rates applicable on the chattels mortgage, any issues taken with the computation of interests could only be supported by evidence, and in the absence of this proof, the Respondent's issues taken on the Bank's claim for interest on the principal sum owed ought to have failed, as there would be no basis for any inquiry into any such entries or additional claims for interest by the 1<sup>st</sup> Appellant where no evidence to the contrary was presented by the Respondent.
- vii. The learned trial magistrate erred in law by failing to appreciate that where a party makes an allegation of any issue of fact, the burden of proof rests on him in contemplation of the express and mandatory provisions of sections 107, 108, and 109 of the Evidence Act.
- viii. The learned trial magistrate in her impugned Judgment correctly set out brief facts constituting the circumstances giving rise to the suit by reproducing in fair detail the respective cases of the parties as presented by the testimonies of their respective witnesses, albeit after determination of the issues isolated for determination, but erred in law and in fact, by abdicating her judicial duty to analyze the issues for determination as against principles of law and reach a finding on the same, by simply stating that without registering the chattel and proper calculated figures then the proclamation must have been illegal, thereby reaching a decision based on speculation and not law or evidence, and hence the conclusion that the figures were correctly calculated and agreed on by the parties then definitely the proclamation wouldn't have been arrived at.
- ix. The learned trial magistrate erred in law by failing to analyze the rival arguments of the parties in its judgment as regards service of the proclamation notice, opting to declare that no proper notice was given to the Respondent, yet the Respondent himself filed a copy of the Notice dated 30.07.2015 served upon him as part of his documents, and his only issue with the same was that he disputed the amounts claimed therein which was quoted at Kshs 847, 067.90. The Respondent, already having admitted in his plaint that he was served with the proclamation notice, the learned trial magistrate failed to appreciate the cardinal principle that parties are bound by their pleadings, and the alleged non-service of the proclamation notice was therefore not a ground to declare the proclamation illegal.



- x. The learned trial magistrate correctly arrived at a finding that the Respondent did not dispute being given a loan by the Respondent but failed to appreciate that the Respondent was therefore bound to pay back the same, and proceeded to declare the proclamation illegal without identifying what right of the Respondent if any, would be infringed by the 1<sup>st</sup> Appellant if it were to reposes and sell the attached goods in compliance with the terms of the agreement between the parties to recover any amounts due, with the result that the court granted an order of permanent injunction against the appellants as a matter of course and without any legitimate basis or at all.
  - xi. The learned trial magistrate erred in law and in fact in issuing an order of permanent injunction restraining the Appellants from interfering with the Respondent's stocks, assets and household goods, despite the glaring evidence that the Respondent has stopped servicing the loan advanced to him and his account with the 1<sup>st</sup> Appellant still stands in arrears.
7. This appeal was canvassed by way of written submissions. Both parties complied and filed their respective submissions.

### **Appellants' submissions**

8. The appellants filed submissions dated 31<sup>st</sup> October 2024 and argued that the trial court erred in reaching a conclusion that the proclamation in question was illegal since the Chattels Mortgage instrument under which it was premised was not registered under the the Chattels Transfer Act, Cap 28 Laws of Kenya within the timelines stipulated in law. According to the Appellant, the mere failure by the Appellant to register the instrument/agreement is not of itself a bar to recovery of the amounts owed by the respondent under the loan agreement.
9. The Appellant maintained that the offer letter, together with the signed Chattels Transfer Instrument, though not registered, formed the contractual basis of the loan agreement between the parties. The appellant, therefore, submitted that the intention should be ascertained objectively and the respondent ought not to be allowed to unjustly enrich himself by retaining money due to a honest lender.
10. According to the Appellant, the purpose of registration under the Chattels Transfer Act, Cap 28 Laws of Kenya, is to protect the Creditor/Grantee against claims by third parties by serving as a formal notification that the securities attached are subject of an encumbrance in favor of the bank. The Appellants submitted that, registered or not, the terms of the Chattels Mortgage are contractually binding on the parties, and the 1<sup>st</sup> appellant is entitled to repossess and sell the property offered by the respondent as security for the loan advanced. Reliance was placed on among others, the case of Meshack Mariera Ongeru vs Credit Bank Limited (2018) eKLR.
11. On whether the order of permanent injunction issued by the trial court was merited, the Appellants submitted that the trial court failed in issuing the said order of permanent injunction, failed to appreciate that the Respondent had failed to prove to the required standards, as required under section 107 and 109 of the *Evidence Act*, that he had fully repaid the loan advanced to him by the Appellant. The Appellant asserted that the principal loan advanced to the Respondent by the bank was Kshs. 1,200,000/- and that as of the date of the proclamation, a sum of Kshs. 847, 062.00/= was still outstanding.
12. Consequently, the Appellants urged this Court to allow the appeal, asserting that parties herein willfully executed and entered into the lending contract and were therefore bound by the terms of the contract, including those in the Chattels Mortgage Instrument, notwithstanding that the same was not registered.



## Respondent's submissions

13. The Respondent, in their submissions dated 13<sup>th</sup> November 2024, supported the finding by the trial court and maintained that the fact that the proclamation was based on an unregistered Chattels Mortgage Instrument rendered the proclamation illegal, null, and void.
14. On whether the order of injunction granted to the respondent was meritorious, the respondent submitted that he was granted a loan of Kshs. 500,000/= as opposed to Kshs. 1,500,000/= he had applied for. The respondent's position is that he had fully settled the loan. The respondent submitted that the loan having been fully repaid, the 1<sup>st</sup> appellant had no business repossessing the respondent's assets.
15. The Respondent, therefore, urged this court to uphold the trial court's decision and dismiss the instant appeal with costs.

## Analysis and Determination

16. I have considered this appeal, the record of appeal, and the rival submissions. I have also had the opportunity to consider the authorities relied upon. The duty of this court as the first appellate court was laid down in *Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

17. I have carefully gone through the memorandum of appeal, the record of appeal, including the judgment of the trial court and distill the following issues for this court's determination:
  - i. Whether failure to register chattels instrument under the Chattels Transfer Act renders it invalid?
  - ii. Whether the respondent proved his case on a balance of probabilities before the trial court
18. Regarding registration of chattels mortgage instruments, Section 6(1) of the Chattels Transfer Act Cap 28, which stipulates that;

“The period within which an instrument may be registered is twenty one days from the day on which it was executed:

Provided that when the time for registering an instrument expires on a day whereon the Registrar's office is closed, the registration shall be on the next following day on which the office is open.”

19. The aforementioned Section limits the time for registration of a chattels instrument to 21 days from the day of execution of the instrument. The time for registration may be extended under Section 9 of the Act. The High Court has jurisdiction to extend time. In the instant case, the appellant sought to extend time for registration of the chattels instrument, but the application was disallowed.
20. It has been admitted by both parties in these proceedings that the chattel instrument was indeed not registered. The only issue in dispute herein is whether the failure to register the chattels mortgage instrument under the Act invalidated the agreement between the parties and therefore makes the lending contract unenforceable.



21. It is important to note that under the Act, the purpose of the registration of securities is to protect the lender's interest against claims by third parties who are presumed to have had notice of the lender's interest by the fact of registration of the document under the Act. Section 4 of the Act is clear that;

“4. Registration of instrument to be notice All persons shall be deemed to have notice of an instrument and of the contents thereof when that instrument has been registered as provided by this Act: Provided that if registration of the instrument is not renewed pursuant to the provisions of this Act, prior registration shall not be deemed to operate as notice after the lapse of the period within which renewal is required by this Act.”

22. Further, Section 13 of the Chattels Transfer Act makes an instrument not registered invalid against certain persons in the following terms;-

“(1) Every instrument, unless registered in the manner provided under this Part, shall, upon the expiration of the time for registration or, if the time for registration is extended by the High Court, upon the expiration of the extended time, be deemed fraudulent and void as against—

- a. The official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in the instrument;
- b. The assignee or trustee acting under any assignment for the benefit of the creditors of that person;
- c. Any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorising the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was issued.”

23. In *Meshack Mariera Ongeri v Credit Bank Limited* [2018] KEHC 5296 (KLR), the Court had the following to say on the import of Section 13 of the Chattels Transfer Act ; -

“15. The appellant is not one of the parties contemplated under section 13 aforesaid as failure to register the chattel mortgage instrument remains a contract inter-parties (see *Walsh v Lonsdale* [1882] 21 Ch D 9, *Clarke v Sondhi* [1963] EA 107 and *Meralli v Parker*, [1956] 29 KLR 26). In this case, the appellant readily admitted that he was indebted and he offered the motor vehicle as security for the loan, the respondent was within its rights to repossess and sell the vehicle to recover the debt.”

24. From the above, it is clear that an unregistered instrument can only be deemed fraudulent and void in respect to the persons enumerated under Section 13 (a) to (c) of the Act. It therefore follows that in this case, non-registration of the chattels mortgage instrument cannot, in law, invalidate the agreement between the parties herein.

25. Consequently, it is the finding of this court that non-registration of the chattels mortgage instrument did not invalidate the agreement between the parties herein regarding the loan agreement, as secured by the chattels listed in the mortgage instrument.



26. On the question whether the respondent proved his case on a balance of probabilities before the trial court, Section 107 of the Evidence Act provides that:
1. Whoever desires any court to give judgment as to any legal right or liability on existence of facts which he asserts must prove those facts exist
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
27. In the case of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015)eKLR*, where the court held as follows;
- “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya)”
28. In this case, while the Respondent claimed before the trial court that the loan amount awarded and/or disbursed to him by the Appellant was a sum of Kshs. 500,000/- and that he had fully repaid the loan, he produced no evidence in that regard. To the contrary, the Appellant produced in evidence a letter of offer dated 30<sup>th</sup> March 2012, clearly indicating that the loan advanced to the Respondent was a sum of Kshs. 1,200,000/-. The Respondent admitted in evidence that he signed the letter of offer for a sum of Kshs. 1.2 Million and executed a mortgage chattels instrument agreeing that the bank would take the items specified therein in the event of default.
29. Having gone through and re-evaluated the pleadings and evidence by the parties herein, I find the Respondent’s version not convincing. First, the allegation by the Respondent that only a sum of Kshs. 500,000/- was disbursed to his account was not pleaded in the plaint, neither was it contained in the two statements the Respondent filed before the court. Secondly, from the letter of offer, it is evident that the Respondent signed for a sum of Kshs. 1,200,000/-. The Appellant, in his pleadings before the trial court, deliberately remained silent on this important aspect of the dispute.
30. It is the position of this court that the Letter of Offer dated 30<sup>th</sup> March 2012, signed by both parties, formed the contract between the parties herein, and it is not within the purview of this court to re-write the contract between the parties. No evidence was adduced that the contract was signed through coercion, undue influence or fraud and thus it is still enforceable. See *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR* where it was held as follows:
- “A court of law cannot re-write 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.”
31. In the circumstances, the appellant's appeal dated September 19, 2023 succeeds, and the trial court’s judgment delivered on 21st August 2023 is hereby set aside in its entirety. The Appellant shall be at liberty to proceed with recovery against the Respondent to the extent of the unpaid loan balance.
32. The costs of this appeal is awarded to the Appellant.
33. It is so ordered.

**SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 6<sup>TH</sup> DAY OF MARCH 2025**

**ADO MOSES**

**JUDGE**



In the presence of:

Moses – Court Assistant

.....for the Appellant

.....for the Respondent

