

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL NO. E262 OF 2023

AFRICAN PROVIDENT LIMITED

**T/A REAL PEOPLE KENYA
LIMITED.....APPELLANT**

-VERSUS-

**TIMOTHY KYALO KINGOLA..... 1ST
RESPONDENT**

BEYOND AUCTIONEERS.....2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable J. B Kalo, Chief Magistrate delivered on 21/08/2023 in Mombasa CMCC No. 1097 of 2015.
2. In summary, the appeal is substantially on the ground that the Learned Trial Court erred in:

(a) Dismissing the Appellant's counter-claim.

(b) Failing to find the amount that was advanced to the 1st Respondent, including the interest charged, despite the amount advanced being clear.

(c) Awarding the 1st Respondent general damages of Kshs. 3,000,000 which was substantive error of law.

3. In the Amended Complaint dated 11/04/2022, it was pleaded that 1st Respondent, the Plaintiff in the lower court, bought Motor Vehicle Registration No. KBX 149Y, the suit property, through a loan facility of Kshs. 4,915,320/= advanced by the Appellant, the 1st Defendant in the lower court. It was averred that pending the execution of the formal contract, the said amount was paid to the motor vehicle dealer (Kshs. 4,575,320/=) and for the construction of the body for the vehicle (Kshs. 340,000/=).
4. The 1st Respondent took possession of the vehicle on 18/01/2013 where he commenced transport business of commercial goods from Taveta to Kitui and other parts of the country where he was making 3 trips per week with an income of Kshs. 25,000/= per trip.
5. It was averred that despite the 1st Defendant repaying the loan through instalments, making a total of Kshs. 1,629,600/=, the Appellant through the 2nd Respondent repossessed the vehicle on 25/10/2014, without

issuing a demand notice nor statement of accounts, hence the repossession was illegal and unlawful.

6. The 1st Respondent sought to have a declaration that the repossession of the suit property was unlawful hence the Appellant be compelled to hand over the ownership of the vehicle or in the alternative, order accounts from the Appellant and liquidate the loan.
7. The 1st Appellant having appreciated that the vehicle was sold by way of public auction on 12/11/2024, the sale proceeds do offset the loan balance and any balance be remitted to the 1st Defendant, and interest charged after the auction be set aside and declared void. The 1st Respondent also sought for general damages for the unlawful repossession and trespass of the Plaintiff's property.
8. The Appellant filed a Statement of Defence dated 19/10/2015. The averments by the 1st Respondent were denied and he was put to strict proof thereof. It was stated that there was an existence of a loan agreement as money could not be dispatched by the Appellant without a valid agreement.
9. It was further stated that the 1st Respondent fell in arrears in repayment of the loan amount and despite demands to settle the accounts, the 1st Respondent remained in default of the loan. The Appellant instructed the

auctioneer to repossess the vehicle which was sold by way of public auction on 20/11/2014 and the proceeds of sale was Kshs. 4,100,000/=.

10. The Appellant filed a counterclaim. It was stated that the loan advanced was payable in 36 months with monthly instalments of Kshs. 228.980/=. The annual interest rate was 23.7%. The loan balance was said to be Kshs. 6.140,397.02/= as at the date of auction. As at 20/11/2025, Kshs. 2,656,016.20/= remained unpaid. The 1st Appellant had previously taken a loan facility of Kshs. 450,000/= which he defaulted and as at 31/10/2015, Kshs. 426,711.83 remained unpaid. The Appellant prayed for judgment for Kshs. 3,082,728/= as at 20/11/2025 with interest at contractual rates until payment in full.
11. The 1st Respondent filed the Reply to Defence and Counter Claim dated 16/12/2025 denying the averments of the Appellant. He prayed that the counterclaim be dismissed and judgment entered as per the Plaintiff.
12. Even though the lower court proceedings were not filed as part of the Record of Appeal, it is discerned from the judgment subject to this appeal that the parties were heard before the trial magistrate. After considering the evidence of the parties, and the written submissions, the court made a determination that the repossession of the vehicle was unlawful and awarded Kshs. 3,000,000 as general damages against the Appellant and 2nd Respondent jointly and severally with interest until payment in full.

13. The court went ahead to dismiss the counterclaim as it was not proved.
14. Aggrieved by the judgment of the lower court, the Appellant lodged this Appeal.
15. It was directed that the appeal be canvassed by way of written submissions. Both parties complied by filing their rival submissions with supporting authorities.

Analysis and determination

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
17. In the case of ***Mbogo and Another vs. Shah [1968] EA 93*** where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. The main issue for determination in this case is whether the Trial Court erred in awarding the 1st Respondent general damages and dismissing the Appellant's counterclaim.
19. It is not in dispute that the 1st Respondent took 2 loan facilities with the Appellant. Even though the 1st Respondent stated that there was no formal agreement between the 2 parties, question arises how a financial institution would lend money without a valid agreement. Further, it is not stated upon which agreement that the 1st Respondent was repaying the loan. The Appellant filed the loan agreements as per pg. 57 to 67 of the Record of Appeal. The 1st Respondent did not plead forgery of documents in the reply to Defence and Counter Claim disputing the authenticity of the agreements filed. I find that the Appellant and the 1st Respondent had valid loan agreements between them.
20. The 1st Respondent in the lower court stated that he was repaying the loan on monthly basis and he had no arrears at the time of repossession of the vehicle. I have perused through the account statement relied on by the 1st Respondent. I do agree with the trial court that the repayments by the 1st Respondent were erratic and not consistent, and that he was in arrears in the loans taken.
21. I do agree with the trial court that from the documents filed, it is impossible to discern the amount due as some of the entries are not clear.

The 1st Respondent having been in default of the loan repayment, the Appellant had a right to repossess the vehicle.

22. The process upon which the vehicle was repossessed was in question. The 1st Respondent stated that the Auctioneer did not comply with Rule 12 of the Auctioneer Rules. The Rule provides as follows;

Movable other than perishable goods and livestock

12 (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

- (a) record the court warrant or letter of instruction in the register,*
- (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;*
- (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;*

(d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;

(e) ensure safe storage of the goods pending their auction;

(f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;

(g) not remove any goods under the proclamation until the expiry of the grace period.

23. From the above, it is clear that the 2nd Respondent did not comply with the Auctioneer Rules in the repossession and selling by way of auction the suit property. The Trial Court was factually correct in its finding that the repossession and auction was unlawful and illegal.
24. The next question is whether the court erred in law by awarding general damages for the illegal repossession of the vehicle. As stated herein above, the 1st Respondent was in default in the loan repayment. The right by the Appellant to repossess the vehicle had accrued. The only problem was that their appointed auctioneer did not follow the mandatory auctioneer rules. Both parties were in breach of their contractual obligations.

25. The 1st Respondent was said to be making a net profit of Kshs. 300,000 per month. From the repayment history, that has not been reflected. I am not convinced that the 1st Respondent was entitled to the general damages awarded for the alleged loss suffered. I am in agreement with the submissions by the Appellant in paragraph 59 and 60 of its submissions and the case cited i.e. *Kenya Women Microfinance Ltd v Martha Wangari Kamau [Kajiado HCCA No. 14 of 2020]*. The general damages awarded are hereby set aside.
26. As to the whether the Appellant's counterclaim was merited, I have perused through the statement of accounts by the Appellant. I do agree with the finding of the trial court that the documents filed by the Appellant were incomplete. The burden of proof lied on the Appellant and who failed to discharge it to the required standard. (See **section 107** and **109** of the *Evidence Act*).
27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526* stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%

as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

28. Therefore, based on the above, the Appeal partially successful. Therefore, each party should bear the costs of the appeal and in the lower court proceedings.

Determination

29. In the upshot, I make the following Orders:

- i. The appeal on the general damages awarded to the 1st Respondent is merited and the same is hereby set aside.*
- ii. The appeal on the counterclaim has got no merits and is hereby dismissed.*
- iii. It is hereby deemed that no party has a claim against the other.*
- iv. Each party to bear its own costs.*

Delivered, dated and signed at Mombasa on this 15th day of May 2025.

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F. WANGARI

JUDGE

In the presence of:

Mr. Wafula Advocate for the Appellant

N/A by the Respondent.

M/S Norah, Court Assistant