Demulla Investment Limited v Ochieng & another (Civil Appeal E031 of 2024) [2025] KEHC 6073 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6073 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E031 OF 2024

DK KEMEI, J

MAY 16, 2025

BETWEEN

DEMULLA INVESTMENT LIMITED ..... APPELLANT

AND

MICHAEL OCHIENG ..... 1ST RESPONDENT

RACHAEL ILAHALWA MUHADIA ..... 2ND RESPONDENT

(Being an appeal arising from the judgment (decree) of the Small Claims Court delivered on 12th day of July 2024 by Hon. J.P Mkala (RM) in Siaya SCCC No. E034 of 2024)

JUDGMENT

1. The appeal herein arises from the judgment of Hon. J.P Mkala in Siaya SCCC No. E034 of 2024 delivered on 12th July 2024 wherein he entered judgment in favour of the Respondents herein by finding the Appellant in breach of the *Movable Property Security Rights Act* and ordering it to pay the Respondents general damages of Kshs50,000/= plus costs of Kshs 5,000/= and interest at court rates.

2. The Appellant was aggrieved by the said judgment and filed its Memorandum of Appeal dated 17/7/2024 wherein it raised the following grounds of appeal:

    1. That the learned magistrate erred in law and in awarding the Respondents herein kshs 50,000/= as general damages when in fact he made a determination that the breach occasioned by the Appellant was calculated at the sum of Kshs 5,941/76.

    2. That the findings therein are against the rule of law and natural justice and as such result into miscarriage of justice.

    The Appellant therefore prayed that the appeal be allowed and that the judgment be set aside and costs be paid to the Appellant.

3. This being the first appellate court, its duty is to evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own independent conclusion as to whether or not to uphold the decision of the trial court. See Selle Vs. Associated Motor Boat Co. Ltd [1968] EA 123.

4. A brief synopsis of the case at the trial court is that the 2nd Respondent who is wife to the 1st Respondent had taken a loan with the Appellant for Kshs13,500/= which was to be paid in four instalments within one month. That however, she did not manage to repay the same wherein the Appellant's agent visited their matrimonial home and seized a 50-inch TV set make Vitron. That they lodged a report to the police and that the Appellant's agent assured them to continue repayment as their TV set was safe. That the Appellant later sold the Tv set yet it was not one of the items identified as collateral since the three-collaterals comprised of shaving machines, two Kinyozi chairs and Samsung Tv 32 inches. That the Tv set Vitron was purchased at Kshs38,990/=. That the balance owed including penalties was Ksh17,364/.

   On cross examination, the 1st Respondent stated inter alia; that it was the 2nd Respondent wo had taken the loan and that he was a grantor; that the Tv set seized was not among the collaterals.

5. The 2nd Respondent adopted the evidence of the 1st Respondent and stated in cross examination inter alia; that she took a loan of Kshs13,500/=; that she defaulted in payment; that the amount demanded was Kshs19,000/=; that the Appellant did not take the collaterals that had been agreed upon; that she had eventually paid a sum of Kshs38990/=; that the Appellant's agent took the Tv set without informing her.

6. The Appellant's witness was Yvonne Akinyi Otieno who stated that she is the operations manager and that she adopted her statement dated 1/7/2024 as her evidence in chief. On cross examination, she stated inter alia; that a demand notice was served; that the Appellant is entitled to repossess items without a court order; that the Appellant did not sue for recovery of the money; that the Tv set in question was among the collaterals; that they did not inform the complainant when the Tv set was sold and that they did not issue a notice of sale of that item; that they sold the Tv set for Kshs26,000/= but did not refund the excess amount after deducting Kshs2050/=.

   On cross examination, she stated that they have not filed a notice of surrender of security.

7. The appeal was canvassed by way of written submissions. Both parties duly complied.

8. I have considered the record of appeal and submissions. I find the issue for determination is whether the Respondents' suit was proved on a balance of probabilities.

9. It is not in doubt that the 2nd Respondent entered into a loan agreement with the Appellant wherein the 1st Respondent who is her husband did not have an objection and that the 2nd Respondent offered certain items/chattels as security for the said loan and which comprised of shaving machines, two Kinyozi chairs and Samsung Tv 32 inches. The 2nd Respondent failed to repay the loan in time thus warranting the Appellant to exercise its rights and to repossess the items offered as security/collateral. Whereas the Appellant was entitled to do so, it made a fatal mistake when it seized a different item which was not among those offered as collateral and which was a Vitron Tv set size 50 inch belonging to the 1st Respondent. Even though the 1st Respondent had allowed his wife to offer three items as collateral, the Appellant was required to first exhaust its rights under the Loan Agreement by disposing off the items that had been offered as collateral. However, the Appellant did not bother to do that and went ahead and disposed of the Vitron 50 Inch Tv set which was not among the items offered as collateral at a throw away price of Kshs26,000/= yet the 1st Respondent had purchased it at Kshs 38,990/=. Indeed, the transaction involving the loan and the collaterals was governed by the *Movable*

Property Security Rights Act No. 13 of 2017. The same Act provided for several guidelines to be complied with by lenders of money to borrowers who offer their properties as collaterals. One of the provisions of the Act is Section 67 (1) thereof which provides that the secured creditor is to give notice to the guarantor to perform the security agreement failing which the property would be sold. Indeed, the Appellant complied with that provision because it issued certain notices through text messages such as "we have not received full payment of the loan you took on 9/4/2024" and " we are giving you a 7 days demand notice to clear your loan totaling to Kshs 17,864/= in full before 13/5/2024" and "we will have no option but to sell your assets to recover our loan in full."

It is clear from the foregoing that the Appellant complied with the provisions of the Act as it gave the Respondents adequate notice.

10. The Respondents' gravamen in the lower court was that the Appellant made a huge mistake by seizing the Vitron 50 Inch Tv which was not among the collaterals that had been listed in the requisite form before the loan was approved. This was the bone of contention and in which the trial court properly analyzed the rival claims and established that the Appellant was not entitled to seize the Vitron 50 Inch Tv. The learned trial magistrate established that the form that contained the list of the collaterals in possession of the Respondents was different from that in possession of the Appellant. Apparently, the Appellant appeared to have doctored the form from its side and inserted the Vitron 50 Inch Tv. A careful perusal of the two forms clearly shows that the document in possession of the Appellant indicates the additional collateral and which did not tally with that in possession of the Respondents because the handwriting used is different. Hence, I am in agreement with the findings by the learned trial magistrate that the Appellant had attempted to have a fast one on the Respondents and thereafter acquire a benefit which was not legitimate. Even though the Respondents were in default of payment of the loan, the Appellant was under obligation to follow the proper channel of claiming its debts. It is also noted that under Section 24(1) of the said Act, if a secured creditor seeks to add more collaterals into the security agreement, the same must be authorized by the grantor. It is also noted that the Appellant did not issue a notice to the 1st Respondent of its intention to sell the 50-inch Vitron Tv. It also transpired from the evidence that the Appellant had assured the 2nd Respondent that it would not sell the said Vitron Tv and informed her to continue making payments and further assured her that the Vitron Tv set was intact. The Respondents were later shocked to learn that the Appellant had disposed off the Tv set at a throw away price and that the Appellant remained with a surplus of Kshs5,941.76/=. It is instructive that under Section 74 (3) of the said Act, the Appellant was under obligation to deposit the surplus to the court for purposes of distribution. However, in the present scenario, the Appellant failed to account for the surplus of the aforesaid sums.

11. From the foregoing analysis, it is clear that the Respondents were given a raw deal by the Appellant who not only seized their Tv set Vitron which was not among the items offered as collateral and sold it but that the Appellant failed to account for the surplus money. The trial court after considering the entirety of the case, awarded the Respondents general damages in the sum of Kshs50,000/= for breach of the *Movable Property Security Rights Act*. The Appellant has urged this court to substitute the general damages of Kshs50,000/= with the surplus sum of Kshs5,941.76/= as the Appellant views the said sum to be sufficient restitution.

12. The award of damages is at the discretion of the trial court and that an appellate court will not normally interfere with such discretion unless the trial court took into account an irrelevant factor or left out a relevant one or that the amount is so inordinately high or low so as to be an erroneous estimate of the damages. In the case of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanin v A.m. Lubia and Olive Lubia [1985] Kenller J.A stated " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were

held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…"

I have looked at the quantum of damages and note that the Appellant had unlawfully seized the Respondent's Vitron 50 Inch Tv set worth Kshs38,990/= and sold it at a throw away price and further failed even to surrender the surplus amount to the Respondents. The Respondents were ordinary folk trying to eke out a living and did not expect the Appellant to take advantage of their economic situation. It is trite law that a remedy under common law for breach of contract is an award of damages for the purpose of compensating the injured party for the loss suffered as a result of the breach but not to punish the party in breach. Looking at the amounts awarded by the trial magistrate, the same is not inordinately high as to suggest that the same was an erroneous estimate of damages. I find the sum of Kshs50, 000/= as general damages was reasonable in the circumstances. In any event, the purpose of damages is akin to restituting the party who has been injured by the other party but who has breached the terms of the agreement. Under common law if a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract has been performed.

13. In view of the foregoing observation it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondents.

DATED AND DELIVERED AT SIAYA THIS 16TH DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of

Okali.....for the Appellant

Michael Ochieng.....1st Respondent

Racheal Ilahawa.....2nd Respondent

Okumu.....Court Assistant