Magnum Credit Limited v Oyola (Civil Appeal E229 of 2024)
[2025] KEHC 11308 (KLR) (Civ) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E229 OF 2024

DKN MAGARE, J

JULY 24, 2025

BETWEEN

MAGNUM CREDIT LIMITED ..... APPELLANT

AND

ONESMUS MBOYA OYOLA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable Ashitsa S. Muhanda (RM/ Adjudicator) delivered on 5.2.2024 in Milimani SCCOMM. No. E4734 of 2023.

2. In the Further Amended Statement of Claim dated 15.12.2023, the Respondent herein prayed for a declaration that the repossession and sale of motor vehicle registration No. KBS 915F was unprocedural and illegal and judgment of Kshs. 750,000/= be entered as against the Appellant with costs and interest on account of a contract relating to installation of motor vehicle tracking devices.

3. It was pleaded that the Appellant and the Respondent entered into a money lending agreement dated 16.1.2023 in which the Respondent attached his motor vehicle registration number KBS 915F as security. Subsequently, the Appellant repossessed the Respondent's motor vehicle on allegations of defaulted payment and loan arrears.

4. In its Statement of Response dated 6.12.2023, the Appellant denied the claim and maintained that the Respondent fell in default of servicing the loan and so the Appellant rightly repossessed the motor vehicle having given the necessary prior notices.

5. In its judgment, the lower court found a valid contract between the parties and that the Respondent was in breach. The court directed the Appellant to release the motor vehicle within 7 days and the Respondent to pay Ksh. 289,153.80/= upon return of the motor vehicle within 14 days. The court

also directed in the alternative that the fair value of the motor vehicle was Ksh. 640,000/= and the Appellant was at liberty to pay to the Respondent the difference of Ksh. 350,846.20/= to retain the motor vehicle.

6. The appeal is on the grounds that the learned magistrate erred in:

   a. Finding that the Appellant did not rightfully repossess the motor vehicle.

   b. Finding that the notice of default did not comply with the law.

   c. Making substantive findings against the auctioneer who was not a party to the proceedings.

   d. Finding that no sale by public auction occurred despite overwhelming evidence to the contrary.

   e. Relying on documents filed after pleadings closed.

   f. Failing to find that under section 26 of the *Auctioneers Act*, irregularity by an auctioneer did not invalidate sale by public auction.

   g. Rewriting the contract between the parties.

   h. Making determination on matters beyond the scope of the pleadings.

   i. Failing to appreciate the totality of pleadings and submissions filed in court.

Submissions

7. The Appellant filed submissions dated 21st November 2024. It was submitted that proper notices were issued prior to the repossession of the motor vehicle. Reliance was placed on Section 67 of the *Movable Property Security Rights Act*, as well as on the case of Eurobank Ltd (in liquidation) v Twictor Investment Limited & 2 Others [2020] eKLR, among others.

8. It was submitted that the lower court erred in granting a remedy that was not prayed for. Reliance was placed on the case of David Sironga Ole Tukai v Francis arap Muge & 2 Others (2014)eKLR.

9. It was further submitted that a default on the part of the auctioneer could not vitiate the contract and the court ended up rewriting the contract between the parties. Reliance was placed on Franklin Gambo Mwagambo v Equity Bank & Robert Maina t/a Antique Auctioneers (2015) eKLR and South Nyanza Sugar Co. Ltd v Leonard O. Arera (2020) eKLR.

10. On the part of the Respondent, he filed undated submissions in which it was submitted that the repossession was without notice and unlawful. That the process in the *Auctioneers Act* and the Moveable Property Security Rights Act were not followed. He cited Section 26 of the *Auctioneers Act* to submit that there was no public auction yet the motor vehicle was purportedly sold. Reliance was also placed on Real People Kenya Limited & Another v Nyandega t/a Akmal Enterprises Limited (2020) eKLR to submit that proclamation was necessary but was not done. They submitted that the lower court did not rewrite the contract between the parties.

Analysis

11. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the *Small Claims Court Act* which provides as doth:

   (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

   (2) An appeal from any decision or order referred to in subsection (1) shall be final.

12. An appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

13. Then what constitutes a matter of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

14. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. In Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, the Court of Appeal held as follows: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

15. A matter of law is similar to a preliminary point of law but has a broader meaning. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow

to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

16. The question of breach of contract is a question of fact. The Respondent's claim was on breach of contract and it was necessary to adduce the contract that was allegedly breached. The Supreme Court of the United Kingdom later stated as follows in the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]:

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

17. To this court, the existence of a valid contact was not disputed and the default in payment was not in issue. It is the procedure for repossession that was questioned. The Appellant did not follow the law in repossessing the Respondent's motor vehicle. It would be expected that the Appellant would notify the Respondent of the default as well as the timelines within which the repossession would have been done. This is because in repossessing, the Appellant would be losing the property in the motor vehicle.

18. The loan amount of Ksh. 230,000/= is said to have been disbursed on 13.5.2023 and the demand was issued on 15.6.2023 for Ksh. 348,277/= inclusive of interest. The lower court noted that the interest rate was exorbitant and unconscionable. The loan interest rate was stated as 2.5% on reducing balance. It was not clear whether this was per annum or per month. From the charged arrears, it was clearly per month. This would translate to 30% per annum and was indeed exorbitant. Mr. Justice Mativo (as he then was) in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) set out vividly propounded himself as follows:

> Unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.
>
> A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed. Unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence ought to have been whether the stronger party had been unduly enriched. That could occur when the price of goods or services departed significantly from the usual market price.

Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable to adequately protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power.

An undertaking that was extracted by an unlawful or unconscionable threat of some considerable harm, was voidable. Economic duress (or business compulsion) could broadly be described as an imposition, oppression, or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. Economic duress was constituted by illegitimate commercial pressure exerted on a party to a contract, which induced him to enter into the contract, and which amounted to the coercion of the will which vitiated his consent.

The party relying on duress had to prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress. On the other hand, a party wishing to rely on undue influence had to prove that the other party had influence over him or her; the influence weakened his or her resistance; the other party used his influence unscrupulously towards the innocent party; the transaction which was concluded was prejudicial; and exercising a normal and free will, the innocent party would not have entered into the jural act or transaction. The court should have regard to the person complaining of the duress and the circumstances in which he found himself at the time and then decide, in the light of all the relevant factors, whether it was reasonable for the person concerned to have suffered fear and to have succumbed.

According to the principle of, perceptive restraint a court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. A court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. Contracts, freely and voluntarily entered into, should be honoured.

19. The Appellant was not entitled to claim such exorbitant interest within a span of one month. This court cannot close its eyes on an illegality. It would appear that the loan was disbursed as a bait to fish the motor vehicle for the purpose of its sale and which this court frowns at.

20. The repossession notice is anticipated under the *Movable Property Security Rights Act*. Under Section 67; Relief for non-compliance.

    (1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.

    (2) The notification required under subsection (1) shall adequately inform the recipient of the following matters—

        a. the nature and extent of default;

        b. if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed;

        c. if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as

to rectify the default and the time by the end of which the default must have been rectified;

d. the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and

e. the right of the grantor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may—

a. sue the grantor for any payment due and owing under the agreement;

b. appoint a receiver of the movable asset;

c. lease the movable asset;

d. take possession of the movable asset;

e. sell the movable asset; or

f. pursue any of the remedies under section 65.

(4) The Cabinet Secretary may prescribe the form and content of a notification to be served under this section.

21. The burden was on the Appellant to demonstrate that it had served the notice in the absence of an admission by the Respondent. The question whether notice should be served is a question of law. However, the question whether notice was indeed served is a question of fact, from which this court cannot differ with the court below. The court below is king on facts by dint of section 32 of the *Small Claims Court Act*.

22. The court agrees that the notice of repossession issued by the Appellant did not meet the requirements of section 67 of the *Movable Property Security Rights Act*. Coupled with the court's finding that the interest rates were unconscionable, I find that the Appellant cannot find reason to differ with the court on whether the repossession was wrongful. It is really a question of fruits of a poisoned tree.

23. I see no manner in which the court departed from the pleadings. The reliefs granted were based on the pleadings and not outside the bounds of the pleadings. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

24. The lower court thus correctly found that there was no public auction and the property in the motor vehicle was available for return to the Respondent. The right to redeem the property was existent and

had not been extinguished. In Santley v. Wilde [1899] 2 Ch 474, Lindley M.R. gave one of the founding explanations of the basis of this doctrine:

The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that 'once a mortgage always a mortgage.

25. Due process was clearly not followed. Notably, Rule 12 (b) of the Auctioneers Rules, 1997 states that a person whose goods are to be sold must be served with a Proclamation of Sale and that if he refuses to sign the same, then the auctioneer shall sign a certificate to that effect. Further, Rule 15 (c) of the Auctioneers Rules states that the owner of the goods must be given seven (7) days notice to redeem the goods so proclaimed failing which the auctioneer shall attach the same in accordance with Rule 15 (d) of the Auctioneers Rules. In addition, Rule 15 (f) of the Auctioneers Rules states that an auctioneer shall arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter. All these were not followed.

25. It was not just an academic demonstration of follow up on the procedure of the law. The Appellant had to demonstrate that the notices including the auctioneer notices were duly served upon the Respondent. Whereas service of the demand notice was not disputed, service of the auctioneers notices was disputed and there was no proof of service. Faced with similar circumstances, the court in *Real People Kenya Limited & another v Nyandega t/a Akmal Enterprises & another (Civil Appeal 33 of 2020)* [2022] KEHC 2118 (KLR) (23 February 2022) (Judgment) stated as follows:

> In the absence of any evidence to prove proper service, this court concluded that the Respondents were not served with the Proclamation, the Redemption notice and the notification of advertisement as required by the law which then rendered the entire advertisement in the Newspaper in the Star Newspaper of 25th August 2017 defective ab initio as the purported sale was tainted with illegalities. Further, it found and held that the Respondents were entitled to general damages for unlawful sale. However, it could not for a fact state that the sale was fraudulent as no evidence was presented in court in that regard.

25. I find no basis for faulting the exercise of discretion by the lower court to summon the auctioneer to testify in court. The net effect is that the Appellant did not follow the procedure in the *Auctioneers Act* and the Moveable Property Securities Rights Act and was liable in the first instance. Therefore, as there is no cross appeal, I find no basis to interfere with the judgment of the lower court. I dismiss the appeal.

Determination

25. In the upshot, I make the following orders:

    a. The appeal lacks merit and is dismissed.

    b. The Respondent shall have the cost of this appeal which I exercise my discretion and assess at Ksh. 75,000/=.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Bulowa for the Appellant

Mumo holding brief for Harry Karanja for the Respondent

Court Assistant – Michael