



**National Bank of Kenya Limited v Chepkwesi & another (Civil Appeal E269 of 2023) [2024] KEHC 8298 (KLR) (Civ) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E269 OF 2023**

**DAS MAJANJA, J**

**JULY 8, 2024**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**PAUL MURIKWA CHEPKWESI ..... 1<sup>ST</sup> RESPONDENT**

**PAUL MURIITHI NJOGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon. GM. Gitonga, PM dated 23.03.2023 at the Magistrates Court at Nairobi, Milimani in Civil Case No.4852 of 2019)*

**JUDGMENT**

**Introduction and Background**

1. On 23.03.2023, the Subordinate Court entered judgment for the Respondents and against the Appellant by declaring that the Appellant' repossession and subsequent sale of the motor vehicle KCB V ("the motor vehicle") was illegal and by awarding the Respondents a global sum of Kshs. 1,000,000.00 for loss of income/loss of user, Kshs. 2,000,000.00 as general damages, interest and costs.
2. The Appellant is dissatisfied with this judgment and now appeals to the court through its amended memorandum of appeal dated 16.06.2023. It seeks to set aside that judgment and substitute it with a judgment in its favour for Kshs. 5,464,201.70 as pleaded in its counterclaim with interest and costs. The appeal has been canvassed by way of written submissions which are on record.
3. In order to contextualize the appeal, I will highlight a brief background of the dispute as it emerged before the trial court. At the material time, the Respondents were business associates involved in the transportation of cargo by road. On or about 14.04.2015, the Appellant, by an offer letter of the same date, offered an asset finance facility to the tune of Kshs. 6,300,000.00 to enable the



- Respondents purchase the motor vehicle which was to be sourced from Transafrica Motors Limited. The Respondents averred that the motor vehicle was to be used for commercial purposes earning them approximately Kshs. 200,000.00 per month in net revenues to be used in repaying the facility.
4. The Respondents stated that sometime in 2016, the motor vehicle broke down for 4 months. The Respondents claimed that they brought this to the attention of the Appellant which apparently represented to them that it was willing to restructure the repayments to accommodate the Respondents' changed circumstances. That as a result of the Appellant's representation, the Respondents stated that they were convinced to pay Kshs. 100,000.00 towards further servicing the facility. Sometime in April 2017, the Appellant instructed its agents to repossess the motor vehicle. In its plaint, the Respondents claimed that this repossession was without any prior notice to them and that the agreement entered into between the parties for the facility did not authorize the Appellant to repossess the motor vehicle under any circumstances. The Respondents claimed that at the time of the repossession, the motor vehicle was in Nakuru fully loaded with cargo and that the Respondents were forced to hire the services of another truck to carry the said cargo at a cost of Kshs. 120,000.00.
  5. The Respondents averred that the repossession was illegal and oppressive and that the Appellant maliciously created a situation where it was impossible to redeem the motor vehicle. They accused the Appellant of illegal actions and breach of contract for which it held the Appellant liable and claimed that they used the motor vehicle for commercial cargo transportation and had secured contracts worth net revenues of Kshs. 200,000.00 which they had foregone for 14 months since repossession to the date of filing suit. As such, the Respondents sought inter alia a declaration that repossession and subsequent sale of the motor vehicle was illegal, special damages of Kshs. 120,000.00, loss of income and/or user for 14 months at the rate of Kshs. 200,000.00 per month and general damages.
  6. The Appellant denied the Respondents' allegations. It averred that after the Respondents signed the letter of offer, the Appellant prepared a chattel mortgage dated 14.04.2015 over the motor vehicle which was to act as security. The Appellant averred that the Respondents defaulted in servicing the facility and the Appellant made a demand for payment by the letter dated 07.01.2016. That despite the Respondents being allowed to restructure the loan, they failed to service the loan prompting the Appellant to issue a 90-day statutory notice which the Respondents failed to respond to. The Appellant further stated that owing to the Respondents' continued default, it instructed auctioneers to repossess the motor vehicle on 11.04.2017 as per the auctioneer's letter dated 12.04.2017. The Appellant stated that it thereafter instructed valuers to conduct and prepare a valuation report for the motor vehicle which was done.
  7. The Appellant also filed a counterclaim. It stated that since the Respondents had failed to service the loan facility, it had a right to impound and sell the motor vehicle to recover the loan arrears. It stated that it advertised the motor vehicle for sale on various occasions and on 19.05.2019, it received a bid from a third party for Kshs. 2,800,000.00 which bid was accepted vide the letter dated 21.05.2018. The Appellant averred that the proceeds realized from the sale were not sufficient to clear the loan in its entirety and that as at 06.08.2019, the accounts stood in arrears of Kshs. 2,314,201.07 with the total outstanding amount at Kshs. 5,464,201.07 which it claimed together with accrued interest and charges.
  8. In response to the counterclaim, the Respondents reiterated the averments in their plaint by restating that the repossession and subsequent sale of the motor vehicle was unprocedural, illegal and was conducted in total disregard of the Respondents' rights and the law.
  9. At the hearing, the 1<sup>st</sup> Respondent testified on his own behalf and that of the Respondents (PW 1) while the Appellant called its credit manager, Michael Mwita (DW 1). In the judgment rendered on



23.03.2023, the Subordinate Court identified two issues for determination; whether the repossession and subsequent sale of the suit motor vehicle was lawful and whether the Respondents were entitled to the reliefs sought. The trial court stated that in addressing these two issues, it would consider the issues raised in the Appellant's counterclaim.

10. The Subordinate Court found that the Appellant was entitled to repossess the motor vehicle as it was on account of the Respondents' admitted default and the demands for clearing of arrears that did not elicit any positive responses. However, it held that the Appellant, having rightfully repossessed motor vehicle had a corresponding legal duty to comply with the law with regard to the subsequent sale by way of auction. That since the Appellant had not produced evidence to show how the sale was carried out, it held that the logical conclusion was that the sale was not lawful and it relied on the court's decision in *NIC Bank Kenya PLC and Another v Ruth Galban Kabiy* [2021] eKLR.
11. The Subordinate Court found that the sale was illegal and the entire process flawed, null and void and declared it as such. It declined to award Kshs. 120,000.00 as special damages for want of proof. It further found that there was no evidence to prove the loss of income at Kshs. 200,000 per month for 14 months and thus awarded a global figure of Kshs. 1,000,000.00. It awarded the Respondents Kshs. 2,000,000.00 as general damages for the Appellant failing to comply with the process and sale of the motor vehicle.
12. The Subordinate Court disallowed the counterclaim on the ground that it would not have been equitable to allow it since it is the Respondents who were wronged by the wrongful and illegal repossession. As stated, this decision is now the subject of the present appeal to which I now turn.

### **Analysis and Determination**

13. In determining this appeal, I am aware that the court is exercising the jurisdiction of a first appellate court and therefore has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (*Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123).
14. The main question for resolution is whether the Appellant was entitled to repossess and sell the motor vehicle. The Appellant had stated that there was a chattels mortgage instrument dated 14.04.2015 which was to act as security. However, this document was never produced. This is why the Appellant argued in its submissions before the trial court that there existed a legal and equitable informal charge between the parties. I agree with the Appellant that the question of whether or not a legal or equitable informal charge existed between the parties over the motor vehicle can be deduced from the *Movable Property Security Rights Act* (Chapter 499A of the Laws of Kenya) ("MPSRA"). Key interpretations in this Act at section 2 include:

"collateral" which means—

1. a movable asset that is subject to a security right; or
2. a receivable that is the subject of an outright transfer;

"debtor" which means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;



"grantor" which means—

- a. a person that creates a security right to secure either its own obligation or that of another person;
- b. a buyer or other transferee, lessee, or licensee of the collateral that acquires its rights subject to a security right; and
- c. a transferor in an outright transfer of a receivable;

"security right" which means—

- a. a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; and
- b. the right of the transferee in an outright transfer of a receivable;

"security agreement" which means—

- a. an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right; and
- b. an agreement that provides for the outright transfer of a receivable;

15. The Appellant submitted before the Subordinate Court that there existed a security agreement within the meaning of the MPSRA which perfected the security between the parties once the motor vehicle was purchased. From the Letter of Offer, it is not in dispute that the Respondents were offered a loan facility by the Appellant and the Respondents offered the motor vehicle as security. From the above provisions of the MPSRA, I hold that the Letter of Offer was a security agreement within the meaning of section 2 thereof. I note that the Subordinate court did not interrogate the Appellant's contentions regarding application of the MPSRA and thus rested its decision on the Auctioneers Act and Rules.
16. Under section 71 the MPSRA, the Appellant as the creditor had the right to obtain possession of the collateral when the grantor ("the Respondents"), '.....has not consented in the security agreement to the secured creditor obtaining possession, but at the time the secured creditor attempts to obtain possession of the collateral, the grantor or any other person in possession of the collateral does not object.' There was no evidence that there was any objection by the Respondents or the person in possession of the motor vehicle when the same was being repossessed and as such, I hold that repossession of the motor vehicle by the Appellant was within the law and the Subordinate Court erred in finding otherwise.
17. On whether the sale was proper, the Appellant relied on section 72 of the MPSRA which provides as follows:

72. Right of the secured creditor to dispose of the collateral



- (1) After default, the secured creditor is entitled to sell or otherwise dispose of, lease or license the collateral in its present condition or following any commercially reasonable preparation or processing.
- (2) The secured creditor may select the method, manner, time, place and other aspects of the sale or other disposition, lease or license, including whether to sell or otherwise dispose of, lease or license collaterals individually, in groups or as a whole.
- (3) The secured creditor may buy collateral—
  - a. at a public auction: or
  - b. at a private auction but only if the collateral is of a kind that is customarily sold on a recognized market.

18. The aforementioned provision gives the Appellant wide discretion as to the manner in which it decides to sell or dispose of a collateral. The Appellant stated that after repossession, it elected to advertise and agreed to sell the same to a third party on 21.05.2018. Of note, is that the motor vehicle was repossessed by the Appellant's agent (auctioneer) on 11.04.2017 and was stored in their yard for just over a year before being sold. It is surprising that the Respondents, who at the time knew the motor vehicle was being repossessed because of their default, never made an offer for the motor vehicle. The record indicates that almost immediately after the motor vehicle was repossessed, the Respondents sought the indulgence of the Appellant to clear the outstanding liabilities against the motor vehicle in 3 years. The Respondents could not therefore claim to not have been given a chance to redeem the motor vehicle when they had been aware for a period of over one year of their outstanding debt but they made no attempts to settle the same. I therefore find that the Appellant's sale of the motor vehicle was lawful. From the conclusions I have reached above, it is clear that the Respondents claim for loss of user/income or damages lacks any basis.

19. On whether the Appellant had proved its counterclaim, I agree with the Subordinate Court that the debt of Kshs. 5, 464,201.07 was not disputed by the Respondents. Since the repossession and sale of the motor vehicle was lawful, I find that the Appellant was entitled to the full amount of the undisputed debt from the Respondents.

### **Disposition**

20. The Appellant's appeal succeeds. The judgment of the Subordinate Court dated 23.03.2023 is set aside and substituted by this court's decision dismissing the Respondents' suit. The Appellant's counterclaim dated 14.08.2019 is allowed on terms that judgment be and is hereby entered in the Appellant's favour for Kshs. 5,464,201.70 with interest from the date of filing the counterclaim until payment in full. The Appellant is awarded costs of the suit in the Subordinate Court and shall pay costs of this appeal assessed at Kshs. 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

