



**Northwave Credit Limited v Winfred Achieng Oketch t/a Tash Transporters (Civil Appeal E720 of 2022) [2024] KEHC 7843 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7843 (KLR)

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

**CIVIL**

**CIVIL APPEAL E720 OF 2022**

**DAS MAJANJA, J**

**JULY 2, 2024**

**BETWEEN**

**NORTHWAVE CREDIT LIMITED ..... APPELLANT**

**AND**

**WINFRED ACHIENG OKETCH T/A TASH TRANSPORTERS.. RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon.J.W. Munene RM/Adjudicator dated 24.08.2022 at the Small Claims Court at Milimani, Nairobi in SCCC No. E1239 of 2022)*

**JUDGMENT**

**Introduction and Background**

1. On 19.08.2021, the Respondent requested for and was granted a loan facility of Kshs. 270,000.00 by the Appellant. Under the agreement, the loan was repayable in 12 months in installments of Kshs. 36,525.00 per month and at a compound interest of 3.5% per month. The loan was secured by a transfer/incharge over motor vehicle registration number KBY \*E (“the motor vehicle”) and the agreement provided that in case of default, the loan was to be charged an additional interest at a rate of 10% per month on the principal balance and that bounced cheques were to attract a penalty of Kshs. 3,000.00 over and above the additional penalty interest.
2. By a statement of claim dated 23.05.2022, the Respondent claimed that she had been diligently servicing the loan with the Appellant presenting cheques as and when they fell due and that as at 25.04.2022, a total of 7 cheques amounting to Kshs. 219,150.00 had been paid. The Respondent claimed that one of the cheques in the sum of Kshs. 36,525.00 was however dishonoured due to a mistake on the part of the Appellant who instead of banking the same on the due date, that is, 19.12.2021, waited and banked the same on 24.12.2021 during the Christmas holidays when the



- Respondent's account had no funds and despite all effort, the Appellant had frustrated every effort by the Respondent to clear the sum with the sole intention of unjustifiably selling away the motor vehicle.
3. The Respondent averred that to make good its clandestine intentions, the Appellant did issue two demand notices dated 31.12.2021, for Kshs. 61,777.50 and another dated 21.02.2022 for Kshs. 130,000.00, without justifying how the sums were arrived at yet there were no other defaults. That on 24.03.2022, the Appellant sent its auctioneers to repossess the motor vehicle on the allegations that the Respondent was in arrears of Kshs. 404,000.00 but abandoned the plans on the Respondent's protests, promising to furnish a statement of account, which the Appellant never furnished. The Respondent claimed that the Appellant not only frustrated the Respondent's effort to clear the sum of Kshs. 36,525.00 being the amount of cheque no. 448 that was dishonored due to the Appellant's mistake but the Appellant had rebuffed all effort by Respondent to understand how the sum of Kshs. 36,525.00 went up to Kshs. 404,000.00 within a period of 3 months.
  4. The Respondent stated that instead of furnishing the statement of account as promised on 24.03.2022, on 13.04.2022, the Appellant through its auctioneers went ahead and repossessed the motor vehicle on the allegations that the Respondent's loan had fallen into arrears of Kshs. 404,000.00. The Respondent however asserted that her loan was not in arrears as claimed and the only amount outstanding is Kshs. 36,525.00 the subject of the returned cheque no. 448 but the Appellant had thwarted the Respondent's effort to clear. The Respondent stated that she continued to present cheques for payment as they fell due even after repossession of the motor vehicle, a clear indication that the Appellant's repossession of the motor vehicle was nothing but a scheme aimed at unjustly enriching itself from the Respondent.
  5. The Respondent stated that there was no justification for the Appellant's actions and they were unreasonable, illegal and in breach of the parties' agreement. She sought judgment for Kshs. 800,000.00 being the value of the motor vehicle that had already been sold and compensation as determined by court.
  6. In its response, the Appellant denied the Respondent's claim and urged the court to dismiss it. It stated that after the loan was disbursed and when the installments started to become due, the Respondent paid the first two months but subsequently the cheques started to bounce, a fact which had been acknowledged and admitted by the Respondent. That the issue of bounced cheques necessitated the Appellant to issue the first demand letter on 31.12.2021 for the Respondent to regularize the debt of which she failed to do and her cheques continued to bounce and subsequently the Appellant issued a second demand letter dated 21.02.2022 but still the Respondent failed to regularize the account.
  7. The Appellant stated that the Respondent's inaction necessitated it to initiate the recovery process by issuing instructions to Vetrack Auctioneers and the said auctioneers were subsequently issued with Court orders on 06.04.2022 to repossess the motor vehicle so that the Appellant could recover its monies. That the motor vehicle was sold at a public auction held on 25.04.2022 for Kshs. 480,000.00. The Appellant contended that it has been severally held that the moment the loan falls into arrears and a borrower is asked to regularize and fails to do so then the borrower is in fundamental breach of the agreement warranting the financier the right to realize the security. The Appellant stated that the Respondent had admitted to having owed the Appellant arrears on unfounded grounds that the cheques were banked on the wrong day and that if that was so, then the Respondent ought to have made payments once issued with the demand letters. That it is trite law that a court ought not to protect a defaulting borrower who knowingly and willingly entered into an agreement therefore had contractual obligations that had to be fulfilled as per the terms of the agreement. The Appellant stated that in addition to having signed the agreement, the Respondent was aware of the default clause and the consequences therein and in this regard the Respondent's claim of Kshs. 800,000.00 was unfounded.



8. The hearing before the Subordinate Court was by way of documents in line with section 30 of the *Small Claims Court Act* (Chapter 10A of the Laws of Kenya) and that the documents filed by the parties were duly produced without calling the makers. After the parties filed their written submissions, the court rendered its judgment on 24.08.2022.
9. The Adjudicator found that a total number of 7 cheques were duly cashed all amounting to Kshs. 219,150.00 and that the Appellant banked the 8<sup>th</sup> Cheque No. 448 for Kshs. 36,525.00 on 24.12.2021. That they therefore issued the notice dated 31.12.2021 for Kshs. 61,777.00 and Kshs. 130,000 without justifying how the sums were allowed and yet there were no other defaults. That therefore, it could only order a refund of the proceeds obtained for illegal sale in the sum of Kshs. 480,000.00 and that the existence and issuance of an ex-parte court order dated 06.04.2022 issued in Milimani Miscellaneous Application number E460/2022 did not validate the wrongful sale of the motor vehicle. The Adjudicator entered judgment against the Appellant for Kshs. 392,750.00 plus costs and interest at court rates from the date of filing suit.
10. The Appellant appeals to this court as grounded on its memorandum of appeal dated 12.09.2022. The appeal has been canvassed by both parties by way of written submissions. Since the submissions restate the parties' positions I have already highlighted above, I will only make relevant references rather than summarize the same in my analysis and determination below.

### **Analysis and Determination**

11. In resolving this appeal, it is worth recalling that the court's jurisdiction is limited by section 38(1) of the *Small Claims Court Act* which provides that '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.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). Thus, the duty of this court is to determine whether the subordinate court's conclusions were supported by the evidence on record and the law.
12. The Respondent's case was that she had been servicing the loan in accordance with the agreement by issuing cheques to the Appellant and that save for one cheque that was dishonoured due to the Appellant's mistake, all other cheques and installments were regular. She questioned how the loan arrears had shot to Kshs. 404,000.00 and yet only the installment of Kshs. 36,525.00 of the month of December had been dishonoured and was later paid. Thus, the Respondent averred that the Appellant's repossession and sale of the motor vehicle was not justified. On its part, the Appellant stated that by 31.12.2021 the Respondent was in arrears and that it had a right to recall the entire loan.
13. I have gone through the record. The Appellant did not deny that the Respondent presented all the 12 cheques that were to be banked every month for 12 months as per the loan agreement. It is also not in dispute that the Respondent's 8<sup>th</sup> cheque was dishonoured. Assuming the other 7 cheques were honoured, the Respondent had paid a total of Kshs. 219,150.00 and the dishonoring of the 8<sup>th</sup> cheque meant that the Appellant was entitled to apply the 10% penalty interest on the principal balance and a further Kshs. 3,000.00 on the dishonoured cheque. Since Kshs. 219,150.00 had been paid, it follows that a principal sum of around Kshs. 50,000.00 remained and thus, the 10% penalty interest on this sum was Kshs. 5,000.00. The Respondent was thus obliged to pay Kshs. 36,525.00 plus Kshs. 5,000.00 plus Kshs. 3,000.00 for this installment bringing a total of around Kshs. 44,525.00. However, in its demand of 31.12.2021, the Appellant stated that the outstanding installment payment was Kshs. 61,777.50.



Two months later, the Appellant stated that the arrears had escalated to Kshs.130,991.77 and a month later, the Appellant stated that the total outstanding arrears was now Kshs. 404,456.55.

14. Under the loan agreement and mathematically speaking, this was not possible and there was no logical explanation by the Appellant to the Respondent or to the Subordinate Court on how the Kshs. 404,456.00 was arrived at yet there was only default of one month installment and that this installment and other subsequent ones were eventually paid. The Appellant did not heed to the Respondent's calls to provide a loan statement or explanations of how the arrears were arrived at which leads to the inevitable finding that the Appellant's repossession and eventual sale of the motor vehicle was not justified. I must add at this stage that it is the obligation of the lender to furnish the borrower periodical statements and statement of account on demand upon payment of a reasonable fee. Failure to provide such statements entitles the court to make an adverse inference against the lender.
15. Having reviewed the record, I hold that the Adjudicator did not misapprehend the evidence on record by finding that the Appellant did not prove that the Respondent was in arrears of Kshs. 404,000.00 hence it was not entitled to repossess and sell the security motor vehicle on that basis.

### **Disposition**

16. The appeal is dismissed. The Appellant shall pay the Respondent costs assessed at Kshs. 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

