Mogo Auto Limited v Otianga (Civil Appeal E036 of 2024)
[2024] KEHC 13055 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13055 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E036 OF 2024

RE ABURILI, J

OCTOBER 22, 2024

BETWEEN

MOGO AUTO LIMITED ..... APPELLANT

AND

JOSEPHINE ADHIAMBO OTIANGA ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable Denis Ogal in the Senior Principle Magistrate's Court at Winam delivered on the 26th January 2024 in Winam PMCC No. E215 of 2022)

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a plaint dated 15.9.2022 in which the respondent sought the following orders:

    i. A declaration that the repossession of motor vehicle registration KCT 792K by the defendants is illegal and therefore null and void.

    ii. An order of permanent injunction to issue directed at the defendants/respondents, their agents, employees, servants or assigns, and or any person whatsoever acting on their behalf restraining them from re-attaching, further repossessing, selling, taking possession of, or in whatsoever way interfering with the applicant's possession of motor vehicle registration KCT 792K (Toyota Wish).

    iii. An order that the auctioneer charges be borne by the 1st defendants.

    iv. Costs of the proceedings and interest thereof in favour of the plaintiff.

2. It was the respondent's case that she entered into a finance agreement with the appellant on the 19th July 2019 where the appellant partially financed the purchase of the suit vehicle to the tune of Kshs. 850,000 whereas the balance of Kshs. 450,000 would be settled by the respondent. The respondent further averred that she duly serviced the loan until July 2022 when she realised that the loan amount was not reducing and that the appellant was levying unconscionable and illegal interest on the loan which was in contravention of section 44(a) of the *Banking Act*.

3. The respondent further averred in her aforementioned plaint that despite servicing the loan and having paid Kshs. 1,400,000 to the appellant, the appellant still demanded Kshs. 979,985 and that when she demanded clarification on the workings of the interest, the appellant withheld the information and proceeded to instruct auctioneers to repossess the suit vehicle.

4. The appellant filed a statement of defence dated 1st February 2023 in which it contended that it was a co-owner of the suit vehicle together with the respondent by virtue of being the lender of the funds used by the respondent to purchase the said vehicle thus the said vehicle was jointly registered as security.

5. It was the appellant's defence that it had a financial interest in the suit vehicle and that repossession would allow it to enforce its rights over the same and that as a result of the same, the trial court ought to have dismissed the respondent's suit with costs.

6. In his judgement, the trial magistrate found that the interest rate charged by the appellant offended Section 44(a) of the *Banking Act* and as such, the terms of the contract between the parties herein on interest rate charged were unfair, unconscionable and oppressive. Further, that subsequently, the actions of the appellant in repossessing the suit vehicle were illegal and as such, the respondent warranted grant of a permanent injunction as sought and also that the appellant was liable to settle the auctioneer's costs. The trial court went ahead to grant the respondent costs of the suit.

7. Aggrieved by the trial court's judgment the appellant filed this appeal dated 23rd February 2024 raising the following grounds:

    a. That the learned magistrate erred in law and fact by failing to consider that the appellant is not a financial institution that would be legally bound by the in duplum rule under the provisions of the *Banking Act*.

    b. That the learned magistrate erred in law and in fact in failing to find that the rate of interest in the circumstances is governed by contractual provisions which were not disputed.

    c. The learned magistrate erred in law and in fact in failing to find that the appellant is entitled to remedies under the *MPSR Act*, one of them being the right to repossession of the collateral to recover the outstanding loan amount.

    d. That the learned magistrate erred in law and in fact in issuing a permanent injunction hence prejudicing the position of the appellant as a secured creditor.

    e. That the learned magistrate erred in law and in fact in failing to find that it is a settled principle in law that the court cannot re-write a contract between parties unless the contract has been proved unconscionable.

    f. That the learned magistrate erred in law and in fact in failing to find that the plaintiff having breached the contract terms, ought to shoulder the Auctioneers and all incidental costs as per the terms of the contract.

8. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

9. The appellant submitted that the trial court erred in arriving at its decision as repossession was undertaken lawfully and procedurally in line with the provisions of section 67 of the *Movable Property Security Rights Act*. It was further submitted that having served the respondent with reminders and notices of suspension indicating default of the loan obligations and pursuant to the security agreement, the appellant was entitled to undertake repossession as a remedy under the security agreement and the *Movable Property Security Rights Act.*

10. The appellant further submitted that the trial court erred in finding that the provisions of section 44(a) of the *Banking Act* applied to the appellant whereas the appellant was neither a bank nor a financial institution within the definition of the *Banking Act*. Reliance was placed on the case of *Momentum Credit Limited v Kabuiya* (Civil Appeal E035 of 2022 (2022) KEHC 13705 (KLR) where it was held *inter alia* that whether an institution is regulated by the *Banking Act* is not a matter of pleading or choice.

11. It was thus submitted that the trial court could not thus rewrite the contract between the parties herein as was held in the case of *South Nyanza Sugar Co. Ltd v Leonard O. Arerea* (2020) eKLR and further that there were no exceptional factors pleaded and proved by the respondent.

12. The appellant submitted that the respondent did not merit the equitable remedy of permanent injunction as she had failed to perform equity and discharge her loan obligations as per the loan agreement.

13. The appellant submitted that it was entitled to costs as it had demonstrated that the trial magistrate had erred in law and fact in his judgement.

The Respondent's Submission

14. The respondent submitted that the repossession of the suit vehicle was illegal, null and void as they were not served with any notice prior to the repossession and thus the trial court did not err in its judgement. Reliance was placed on the case of *Mogo Auto Limited v Ochola* (Civil Appeal E071 of 2023) [2023] KEHC 17527 (KLR) 4th May 2023) Judgement where it was held interalia that having not given notice, it was irrelevant whether the interest was exorbitant or not as repossessing without notice and valuation was in breach of the agreement between the parties.

15. It was submitted that the in duplum rule applied to the appellant. The respondent further submitted that the appellant's witness failed to provide evidence that it was licensed to issue loans and charge interest.

16. The respondent further submitted that the interest charged by the appellant was unconsciable and thus the court needed to interfere with the contract between the parties herein as was held in the case of *National Bank of Kenya v Pipe Plastic Sankolitt (K) Ltd* Civil Appeal No. 95 of 1999. Further reliance was placed on the case of *Magure & 2 Others v Higher Education Loans Board* (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) (19 August 2022) (Judgement) where the court held interalia that the in duplum rule was concerned with public interest and was introduced to tame the appetite of lenders who had made recovery of interest and was thus applicable to those lending monies as it was to banks.

17. It was further submitted that there was no valid loan contract between the parties herein as the contract filed by the appellant was not signed and or executed by parties and thus cannot be enforced.

18. The respondent further submitted that the trial court was in order to permanently estop the appellant from demanding more payments from the respondent as this was in violation of section 44 (a) of the *Banking Act*.

19. The respondent thus submitted that the instant appeal be dismissed with costs as it lacked merit.

Analysis and Determination

20. 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, bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. The basic facts of the case are not disputed and indeed the trial court found as a fact that the respondent accepted the loan but defaulted in repayment whereupon the appellant repossessed the suit motor vehicle which had been given as security by the respondent. To this end, and as a preliminary matter, the respondent is estopped from claiming as she did in her submissions, that the agreement between herself and the appellant was not a valid loan contract for reason that the contract filed by the appellant was not signed and or executed by parties and thus cannot be enforced. By upholding this assertion by the respondent, the court would be upholding the respondent's doublespeak. The respondent in her witness statement signed on 15th September, 2022 and which she adopted on oath stated at paragraph *1* that: "I entered into a motor vehicle finance agreement on the 18th Day of July 2019 with the 1st defendant herein." How then does she escape from her own admission on oath and pleadings?

22. The appellant's contention in this appeal in a nutshell is that the trial court erred in holding that the in duplum rule applied to the appellant whereas the appellant was not a financial institution as defined under the *Banking Act*; that the appellant was well within its rights to re-possess the suit vehicle having given the appropriate notice in line with the provisions of the *Movable Property Security Rights Act* and that thus, the respondent was also liable to settle the resultant auctioneer's fees.

23. Firstly, as to whether the appellant is a financial institution as defined under the *Banking Act* and whether the in duplum rule applies to it, the respondent described the appellant as a limited liability company dealing in chattel finance business. The appellant in its own statement of defence described itself as a registered company in Kenya whose business is to issue motor vehicle and cycle finance loans. DW1, who testified on behalf of the appellant stated that the appellant is a financial institution that provides loan financing agreements, security rights agreements and loan payment schedule. In cross-examination, DW1 stated that the appellant is a financial institution permitted to charge interest.

24. The respondent's case before the trial court hinged on the application of section 44 of the *Banking Act*. This section incorporates the in duplum rule which basically limits the amount that a bank or financial institution may recover from a non-performing loan. The section provides, in part, as follows:

> 44A. Limit on interest recovered on defaulted loans.
>
> 1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

2. The maximum amount referred to in subsection (1) is the sum of the following—

a. the principal owing when the loan becomes non-performing;

b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

c. expenses incurred in the recovery of any amounts owed by the debtor.

25. In resolving this issue of whether the in duplum rule applies to the appellant herein, this Court must define what an institution and or financial institution under the *Banking Act* is. The following definitions in section 2 of the *Banking Act* are relevant:

> " institution" means a bank or financial institution or mortgage finance company.
>
> "financial institution" means a company other than a bank which carries on or proposes to carry on financial business and includes any other company which the Minister may by notice In the gazette, declare to be a financial institution for the purposes of this Act.
>
> "financial business" means –
>
> a. The accepting from members of the public of money on deposit repayable on demand at the expiry of a fixed period or after notice and
>
> b. the employing of money held on deposit or any part of the money by lending, investment or in any other manner for the account and at the risk of the person so employing the money.

26. For purposes of section 44, it must be established that the appellant is a bank or financial institution. It is not in dispute that the appellant is neither a bank nor a mortgage finance company. It does not engage in financial business within the meaning of the *Banking Act*. In order to qualify as a financial institution, the appellant must either be gazetted as such by the Minister or be one that carries on or proposes to carry on financial business as defined under the *Banking Act*. In order to qualify as a financial institution, it must accept money on deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the Act.

27. No evidence was presented before the trial court by either party to prove that the appellant is a money deposit taking institution. On the contrary, the evidence on record adduced by both parties is that the appellant provided finance for the purchase of motor vehicles and cycles.

28. The appellant herein urged this court to uphold the trial court's decision regarding the in duplum rule being applicable to the appellant herein on the grounds that the said rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures as was held in the Magure supra case.

29. The rationale for the In duplum rule was explained in the latter case of *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* 2019 eKLR wherein the court of Appeal held: -

> " The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks

making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

30. From the foregoing, the Court of Appeal was alive to the fact that the rule was concerned with public interest. Thus, the rule was introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.

31. That being said, the legislature went on to set out when section 44 of the *Banking Act* would kick in. It did not set down institutions such as the appellant herein who is neither a financial institution nor involved in financial business as provided for in the *Banking Act*.

32. Respecting the doctrine of separation of powers, this court cannot usurp the legislative duties of the National Assembly by including the appellant as a financial institution by stretching the application of section 44 of the *Banking Act*.

33. For the above reason, I respectfully disagree with the holding in the Magure Case that the in duplum rule is applicable not only to banks but also to lenders. In any case, this court is not bound by the said holding being a court of concurrent jurisdiction. I am however in agreement with the holding by my brother Majanja J [RIP] in *Momentum Credit Limited v Kabuiya* (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) that the in duplum rule is not applicable to non-deposit taking money lending institutions.

34. The regulation of interest rates is governed by section 44 of the *Banking Act* which is very specific as to its application and by all means, does not include the Appellant herein. My reading of the facility letter specifically Schedule 1 reveals that interest on the asset backed finance facility was pre-calculated and predetermined and agreed upon at 5% on a reducing balance.

35. Accordingly, I find that the trial court erred in applying section 44 (a) of the *Banking Act* to the appellant. I find and hold the said section 44 aforesaid does not apply to the relationship between the appellant and the respondent. The irresistible conclusion is that the rate of interest in the circumstances is governed by contractual provisions which are not disputed. The Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* 2014 eKLR where the court observed as follows:

> "It is not for the court to rewrite a contract for the parties. As this court held in *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd* Civil Appeal No 95 of 1999 "a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

36. I agree with the statement of law explained by the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR that:

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

37. The respondent did not allege and neither did she prove coercion, fraud or undue influence prior to getting into the loan agreement with the appellant.

38. The substantive unconscionability relied on by the respondent was based on breach of the section 44 of the *Banking Act* which I have found is not applicable to this case.

39. The respondent submitted that the repossession of the suit vehicle was illegal, null and void as they were not served with any notice prior to the repossession and thus the trial court did not err in its judgement.

40. On its part, the appellant asserted that it served the respondent with reminders and notices of suspension indicating default of the loan obligations and pursuant to the security agreement then it was entitled to undertake repossession as a remedy under the security agreement and the *MPSR Act*.

41. Section 67 of the *Movable Property Security Rights Act* provides that:

> 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.

42. It was the burden of the appellant to demonstrate that it had served the notice in the absence of an admission by the respondent (see *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260).

43. The appellant herein attached reminders addressed 16.12.2021, 22.01.2022, 25.01.2022 and 28.01.2022 as well as Notices of Suspension of Loan Facility dated 15.02.2022, 22.06.2022 and 1.09.2022.

44. The respondent denied receiving any notices before the repossession of the motor vehicle was done by the Auctioneer. There was no Certificate of Postage or even an email to prove the mode of service used by the appellant to send the notices in issue to the respondent herein and neither is there any other evidence presented by the appellant showing that the said letters were sent in any way to the respondent. There was therefore non-compliance with section 67 of the *Movable Property Security Rights Act.*

45. Having failed to prove that it served any notice and without valuation of the security, the Appellant was breaching on the agreement and in repossessing the vehicle, the appellant was violating section 67 of the *Movable Property Security Rights Act.*

46. The upshot of the above, therefore, is that the repossession of the suit motor vehicle was illegal, null and void. Subsequently, the respondent was not liable to settle the auctioneer's charges arising from the illegal repossession process commenced by the appellant.

47. Finally, as to whether the respondent merited grant of permanent injunction against the appellant or its agent restraining them from re-attaching, repossessing, selling, taking possession or interfering with the respondent's possession of the suit vehicle.

48. A permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.

49. The question in this case is whether there were any compelling factors that would warrant the granting a permanent injunction against the appellant?

50. It is not disputed that the respondent defaulted to repay the amount advanced to her for purchase of the motor vehicle. In other words, she was in arrears to the appellant. Accordingly, it is my finding that this case does not fall within the category of clear-cut cases that can form a basis to grant a permanent injunction as that would permanently prevent the appellant from repossessing the motor vehicle as per the agreement even where it has followed the procedure provided for in the *Movable Property Security Rights Act*.

51. A permanent injunction as was granted in this case requires a higher level of proof than ordinary injunctions. In this case, it is my finding that albeit the appellant did not prove service of notices before repossession of the motor vehicle, I find that the Respondent had come to court with unclean hands and was not entitled to an equitable remedy. I therefore find that the learned trial magistrate misdirected himself in granting the permanent injunction since the Respondent was in arrears and therefore the court had reached the wrong conclusion.

52. Taking all the aforementioned into consideration, it is my finding that the instant appeal is only partially successful. I set aside the order applying the in duplum rule to the transaction between the appellant and the respondent.

53. I further set aside permanent injunction issued against the appellant, which directed the appellant, their agents, employees, servants or assigns, and or any person whatsoever acting on their behalf restraining them from re-attaching, further repossessing, selling, taking possession of, or in whatsoever way interfering with the applicant's possession of motor vehicle registration KCT 792K (Toyota Wish).

54. I further set aside the order and finding by the trial court that the interest charged was illegal and unconscionable. However, as there was no proof of service of Notice prior to the repossession of the suit motor vehicle, I set aside the repossession of the suit motor vehicle and order for restitution of the same to the respondent. The appellant shall only repossess the suit motor vehicle after following the legal procedure for such repossession, where there is default.

55. On costs of the auctioneer, the auctioneer being an officer of the court ought to have satisfied himself that notice for such repossession was issued before attaching the motor vehicle. He did not produce any notice before repossession. I therefore order that each party shall bear their own costs of the suit in the lower court and of this appeal, including auctioneers' costs of repossession which this court has found was illegal as it was done without notice.

56. This file is closed.

57. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE