



**Plantinum Credit Limited v Mwewe (Civil Appeal E190 of 2021)
[2023] KEHC 3536 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E190 OF 2021
DKN MAGARE, J
APRIL 20, 2023**

BETWEEN

PLANTINUM CREDIT LIMITED APPLICANT

AND

HEZEKIEL ETUKO MWEWE RESPONDENT

JUDGMENT

1. This matter can disturb any conscious. The dispute real is that of lack of pragmatism and grand standing. A matter that started as an issue of default, has risen a tragedy of cataclysmic proportions.
2. It is a case that should never have happened. This ruling will therefore be a constant reminder that once parties are seeking for their bound of flesh closest to the heart, they should be pragmatic and have regard to rights of others. Parties must learn to accept decisions judiciously and move on.
3. Words of Al Gore, in his conceding speech after losing unfairly, so he thought, to George Bush Junior, should be a guide to our relations and ring true in cases of this nature: -.

“Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that ...

Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done. And while there will be time enough to debate our continuing differences,



now is the time to recognize that that which unites us is greater than that which divides us.
(adjusted to UK English).”

4. The supreme court had this to say in the presidential election petition- Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (20 September 2017) (Judgment): -
 - (394) It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*.
 - (395) And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law “is the heritage of all mankind” and “a salutary reminder that ‘wherever law ends, tyranny begins’”. [122] Cast the rule of law to the dogs, Lutisone Salevao once observed “and government becomes a euphemistic government of men...” He adds: “History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.”[123] The moment we ignore our Constitution the Kenyans fought for decades, we lose it.
5. Times when parties ignore prudence are times gone by and can never be repeated. Times when brokers, usurers and other people of the ilk held sway are long gone. The law must be exercised with prudence and rule of law in mind. One cannot refuse payment and clog the equity of redemption to a level where they simply rob off the property from innocent persons.
6. Commerce must have a conscience and equality of arms is the linchpin of contractual obligations. The respondent is faced with all of his vehicle without knowing the amount due. Payments made fall into a bottomless pit. A simple request to account over an issue of less than 16,000/= sprawls an appeal. This is not a case of dispute as to the amount due. It is a dispute where one party says he has cleared but the other does not know whether he has cleared and does not care.

Background to the case

7. By a plaint dated 10/3/17 the plaintiff claimed for a permanent injunction restraining the defendant from, sale of motor vehicle registration No. KCB 623X valued at Ksh. 600,000/=.
8. The Respondent averred that he made cash and Mpesa deposits and fell into arrears. He stated that the car was impounded sometime in February 2017 and claimed arrears of Ksh. 155,866.49. The plaintiff settled the amount but the Applicant was claiming other amounts.
9. The Appellant in their defence stated that the Respondent fell into arrears and as such repossession was rightly and legally exercised. The state in paragraph 12, of the Defence that,

“The defendants avers that the value of the motor vehicle is inconsequential and further adds that it being used as collateral... that it could be disposed of to recover the defendants investment upon default by the plaintiff.”
10. The above is not correct statement in law and shall actually be the determinant of this appeal. This attitude was swept away by dint of Article 46 of *the Constitution* since 27th August, 2010. One peculiar



aspect of the defence, is that there is no mention of the amount due. This is crucial as it will become clear shortly.

11. The Defendant's witness Richard Simbala indicated that the loan application was Ksh. 90,000 on 6/7/16 and collateral was motor vehicle registration No. KCB 623X. The Defendant avers that loan arrears and storage charges are not cleared. These were also not indicated. They produced 7 exhibits as per their list of documents dated 28/7/2017. He produced a statement as at 29/2/2017.
12. There is another allegation in paragraph 12 of a replying affidavit dated 22/3/2017, which I take the liberty to reproduce.

“It is trite law that ne injunction will not issue on the basis of accounts not having been taken.”

13. The above is fallacious. The proper position is that an injunction cannot issue when there is only a dispute on the amount due. In this case only the Respondent had laid out his accounts and as such there is not dispute as to the amount due. Further, the position relates only to interlocutory injunction. It does not bar the court from finding in its final analysis that there is either not amounts due or that the accounts be taken.
14. The Respondent testified that he paid late in one or two months but did not default. The demand for the letter was payment. The letter was not sent to the Respondent.
15. The appellant testified that the Respondent was to pay a term loan of 126,000/= with 90,000/= as principal and interest of 36,000/=. The Respondent received on Ksh. 76,150/= the plaintiff had allegedly had 67,442 due before the Repossession. He made a further payment of Ksh. 50,000. The mount of Ksh 50,000/= is not included in the bank statement. The Appellant admitted in evidence that they did not update their records. If the appellants witness is to be believed the vehicle is attached over a sum of Ksh. 17,442. if not less. He stated in evidence.

“After repossession the plaintiff paid over 50,000/=. The amount is not captured in the statement. The amount is not captured in any of the documents supplied.”

16. At the time of closing the defence case, there is no explanation for the demand of Ksh. 155,866.49. On the other hand the Respondent maintains that he cleared the loan.
17. The court having heard the parties, ordered that account be rendered and the motor vehicle be released to the Respondent. The appellant filed this appeal setting out 9 odd grounds of appeal.

Appellant's submissions

18. The appellant's submissions christened “Defendants submissions were filed on 2/3/2023. It gives the trial court history and the evidence tendered. They rely on the fact that the Respondent freely executed the agreement and made payments less than monthly installments. They respect the appellants case and that Mr. Simbala confirmed that a sum of Ksh. 67,442.17 was paid at the time of repossession.
19. Paragraph 27 deals with a sum of Ksh. 42,300 paid on 8/3/2017 and 9,000 on 1/3/2017. These amounts are not borne out of evidence of all the parties.



20. The Appellant relies on two authorities where they submit in respect of the case of Kundan Singh Construction Company International Limited vs bank of Africa Kenya Limited (interested Party) HCC No. 71 of 2015, court, stated: -

“The Plaintiff has admitted to owing the Defendant money. The Plaintiff had obtained the said monies by way of the Debenture dated 5th August 2011 which provided for the appointment of a Receiver at any time after the principal monies thereby secured become payable. The Debenture document is not in dispute. Therefore, the Defendant’s right to appoint a receiver to manage the Company’s affairs has arisen ... This was an Agreement entered into by the parties and indeed it is commonplace that this Court cannot rewrite or alter the same. The responsibility of the Court is limited to only enforcing contracts within the law....”

21. The appellant also relies on the court of appeal decision in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999, where they stated as doth: -

“Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view is a serious misdirection on the part of the learned judge. A Court of law cannot re-rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”

22. The second authority is binding on this court. However, it is not applicable. The case for the Respondent is that he had cleared the loan. The case for the Appellant is that about 16,000/= is due. The magistrate simply asked for accounts. The same was ex gracious as the Appellant had already admitted that they received money which they did not put in the Respondent’s account and therefore is unaccounted for.

Respondents submissions

23. The Respondent relied on oral submissions. They stated that the Appellant is not accepting my money. I observe that the appellant acknowledged that they have repulsed all offers to settle. The Respondents appear to be out of desperation ready to make more illegal payments just to get their car. I have this uncanny feeling that the car may actually have been sold, hence the refusal to surrender it back to the Respondent or even take payment.

Analysis

24. They also deal with grounds 1, 2, 4, 6 and 8. They rely on the authority of Giella vs Cassman Brown & Co. (1973) EA 358. They have dealt with interlocutory injunction although this is hearing of an Appeal from final judgment. They finally deal with grounds 2 & 3 on release of the motor vehicle. They rely on the fact that a mandatory injunction cannot issue at the interlocutory level.
25. As a preliminary point, I will dismiss in limine grounds 1, 2, 3, 4, 6, 8 for a simple reason. It is addressing orders issued at an interlocutory level. We are dealing with a final judgment and Decree of the court after testimony. The authorities are good law but for interlocutory matters. They are irrelevant in final cases.



26. The only submissions worthy considering is on grounds 3, 5 and 9 in a paragraph 30 – 38 of the Submissions. It is noteworthy that the Appellant may as well have a right to recover loan arrears, and other charges. But how much were those. On the face of clear and unambiguous pleading, it was the duty of the Appellant to place evidence on the record on the extent of indebtedness
27. The Respondent pleaded, and testified that he cleared the loan. In the defence there is no pleading on the amount due. Further, there is no evidence of the amount due. By their own admission, the Appellants say, that they received payment and did not place it in the account or issue an updated statement. The appellant did not find anything wrong with such submissions. The court has no duty to alter the contract between parties.
28. However, once, one is written parties are bound by it. It is not the duty of the court to belief existence of a fact that is neither pleaded nor testified on.
29. Section 107 and 108 of the Evidence Act provides as follows; -

“Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

30. The appellant admits having received the money. He then needs to tell us how much remained. In a dispute of this nature, where one received money and it is within their special knowledge, then failure to keep that information is should be construed against them. Section 112 of the Evidence Act provides.

“Proof of special knowledge in civil proceedings.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

31. agree with the case National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR. The Respondent is not saying that the bank statement was illegal. He is saying:-
- a. He has paid contractual amounts.
 - b. The amounts are not reflected in the statement from the Appellant.
 - c. The Appellant has admitted that fact.
 - d. The appellant is demanding other amounts, that is Ksh. 1555,466.86 out of the blues. The Respondent admitted that there are amounts paid but not settled in the statement.
 - e. The Respondent has not claimed that Ksh. 155,466.86 is due is now claimed Ksh. 17,862 or thereabouts.
 - f. The last claim is storage charges which have not been claimed in the suit.



32. Financial institutions do not reject money unless, something is amiss. I cannot place my hand on the thing that is missing from the equation but will, with this judgment unearth the mischief.
33. The court, then sitting as a court of equity gave the appellant an undeserving chance to carry out accounts and report. They squandered the chance and come to this court, a court of law. The parties must at all times remember that equity follows the law. I do not find basis for an order of account. The appellant decided not to bring all documents on how they were paid. The Respondent testified that he has cleared the loan. He paid cash and Mpesa.
34. Regarding Mpesa, he exhibited the statement. In that connection, it is the appellant who have the books of accounts, up to date showing the indebtedness failure to produce the same, should be construed against them. This was succinctly stated by justice G V Odunga as then he was in *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*

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“41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

35. Once the appellant decided to selectively bring to court evidence and conceal payment, this court has no option than to believe the Respondent when he says he cleared the loan. I do so hold.
36. In the circumstances, having cleared the loan, there is no basis whatsoever to attach the Respondent motor vehicle.
37. In fact, even the demand letter allegedly given, which the plaintiff saw for the first time in court was for Ksh. 24, 062.50.
38. Having received over Ksh. 76,000/=, the Respondent could only repay Ksh a little amount, being the balance. However, he has paid money that is falling into an endless bottomless pit. A pit deeper than Sheol, it is actually Tartarus. Who will get the Respondent out, if not the court.
39. This court cannot allow that to happen. This is more so when the appellants witness could not justify the amount of Ksh. 155,866.49. Had they wished the court to believe that these are arrears, they should have brought to the court bankers books or statements to show the payment and justify the sum of Ksh. 155,866.49.
40. That sum has not to date even by parole evidence been justified.
41. In view of the failure to justify other charges of Ksh. 155,866.49 the same are not contractual, are illegal unlawful and the Respondent is not bound to pay the same.



42. The appellant sought stay of execution pending the hearing and determination of this Appeal. In oral hearings the appellant admitted that they rejected an offer of Ksh. 100,000/= as storage charges were unpaid.
43. Given that the plaintiff had cleared the loan, he is not bound to pay storage charges. The court below gave a timeline for taking accounts but the Appellant were adamant. I however note that the subject motor vehicle may have been destroyed, validated or devalued due to the 5 year hiatus.
44. While ordering release will have to give other conditionality. The motor vehicle was value at Ksh. 600,000/= as at July, 2016 and was repossessed in early 2017. I exercise my discretion to avoid the Respondent getting pyrrhic victory as follows: -
- a. The Respondent will cause the motor vehicle to be valued on its state, before collecting.
 - b. The said motor vehicle be collected by the Respondent be surrendered, after valuation, to the Respondent immediately after valuation without any storage charges.
 - c. The Appellant to bear storage and auctioneers charges, if any.
 - d. Should the Respondent be unable to have access in the next 7 days, then the Appellant shall pay the value of the said motor vehicle of Ksh. 600,000/= to the Respondent within 30 days, in default execution do issue.
 - e. The appeal lacks merit and except the prayer for accounts, that has been modified above, the application is dismissed with costs of Ksh. 135,000/= to the Respondent.
 - f. The Respondent to have costs of the suit in the lower court.
45. I therefore make the following orders: -
- a. The claim by the appellant for Ksh. 155,866.49 is untenable, illegal and non-contractual. The Respondent is not bound to pay the same.
 - b. The prayer for account is set aside and in lieu therefore I issue the following orders: -
 - a. The Respondent will cause the motor vehicle to be valued on its state by Automobile Association of Kenya (AA) before collecting and if the motor vehicle registration No. KCB 623X is in good shape after valuation the same to be collected unconditionally.
 - b. The said motor vehicle be collected by the Respondent be surrendered, after valuation, to the Respondent immediately after valuation without any storage charges or other charges.
 - c. The Appellant to bear storage and auctioneers charges, if any.
 - d. Should the Respondent be unable to have access in the next 7 days, or the vehicle be in such a state that it is vandalized or deteriorated beyond measure, or lost more than half if its value, in the opinion of the valuer, then the Appellant shall pay the value of the said motor vehicle of Ksh. 600,000/= to the Respondent within 30 days, in default execution do issue.
 - e. Upon payment of Ksh 600,000/= the Respondent should transfer salvage to the Appellant



- a. The appeal lacks merit and except the prayer for accounts, that has been modified above, the application is dismissed with costs of Ksh. 135,000/= to the Respondent.
- b. The Respondent to have costs of the suit in the lower court.
- c. In any case the appellant, Platinum Credit Ltd to bear auctioneers and storage charges.
- d. Upon execution and payment of the sum of Ksh. 600,000/= together with interest thereon, the Respondent to execute transfer for the salvage of KCB 623X as salvage to the Appellant or their order free from any charges.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF APRIL 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr Wafula for the Appellant

Mr Oduor for the Respondent.

Court Assistant - Firdaus

