



REPUBLIC OF KENYA



KENYA LAW
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**Mogo Auto Limited v Ochola (Civil Appeal E071 of 2023)
[2023] KEHC 17527 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E071 OF 2023**

DKN MAGARE, J

MAY 4, 2023

BETWEEN

MOGO AUTO LIMITED APPELLANT

AND

ERIC OCHOLA RESPONDENT

(Being an appeal arising from the judgment of Hon. V. Muthoni in CMCCC No. E331 of 2022, delivered in the Small claims Court at Mombasa on the 24th day of February, 2023)

JUDGMENT

1. This Appeal is due for dismissal. The appellant states that the respondent used unpleaded issues.
2. On the other hand, the respondent states that they paid and the motor vehicle was irregularly repossessed and sold. In law the duty to pay always rests with the debtor. He must seek his creditors and pay them. Failure of which any consequences flowing therefore shall be visited on the debtor. However, debtors are not soothsayers or magicians to surmise when a debt possibly could be due.
3. The amount that has been advanced to the respondent had been Kshs 300,000 and he had paid Kshs 238,388. The respondent purported to issue notice under 67 of the *Movable Property, Security Rights Act* in which they gave 24 hours for remedy. A notice issued with 24 hours is real notice at all. It does not give time for any default to be rectified and or remedies under section 67 to be enjoyed.
4. Having not given notice its irrelevant whether interest was exorbitant or not. By repossessing without notice and without valuation, the Appellant was resiling on the agreement in situ, consequently in breach of the said agreement.
5. Pleadings related to breach of contract on part of the Respondent. The notices issued relate to suspension of a loan and do not necessarily give time for rectification.



6. The Court found as a fact that the sale was carried out within the grace period within, which the Respondent had been asked to pay. I agree with the court. Though on different grounds I find that the court was right in not enforcing contract having reside on the agreement. It is only fair that the appellants refund the money received by them.
7. I therefore do not find any point of law raised Whether or not to enforce an unconscionable agreement was the discretion of court. I cannot set aside discretion.
8. In *Shah= vs= Mbogo (1968) EA 930*, the Court stated as follows:-

' For myself I like to put in the words that a court of Appeal should not interfere with the exercise of the discretion unless he has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.'
9. In the circumstances therefore, I dismiss the entire appeal.
10. As regards costs, a successful party is entitled to costs. However, the Respondent herein does not deserve costs. I ordered on April 26, 2023 that there be stay of execution in the presence of both parties in the morning. The Respondent however instructed auctioneers who filed a letter on the same day for the issuance of warrants inspite of my orders. I will not give them costs as that will be rewarding impunity. The Respondent shall bear the auctioneers charges for any execution done on or after April 26, 2023 and the date of judgment, while my orders were in situ.
11. There will be 30 days stay of execution of the lower court judgment pending payment of the Judgment sum. Any goods attached after April 26, 2023 shall be returned unconditionally to the appellants.

DELIVERED, DATED and SIGNED at **MOMBASA** on this **4th** day of **May, 2023**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Ouma for Appellant

Erick Ochola the Respondent

Court Assistant - Aziza

